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Report
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THE CIVIL RIGHTS ACT OF 1990

June 8 (legislative day, April 18), 1990.—Ordered to be printed

Mr. Kennedy, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 2104]

The Committee on Labor and Human Resources, to which was referred the bill (S. 2104) to amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill as amended do pass.

CONTENTS

Page
I. Introduction 5
II. Summary of the legislation 6
III. Hearings 8
IV. Need for the legislation 10
V. Summary of committee action 37
VI. Explanation of the legislation 38
VII. Regulatory impact 60
VIII. Cost estimate 61
IX. Minority views 63
X. Changes in existing law 118

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1990".

S543-7.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and

(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

(b) PURPOSES.—The purposes of this Act are—

(1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

(2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

SEC. 3. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'group of employment practices' means a combination of employment practices that produce one or more employment decisions.

"(o) The term 'required by business necessity' means essential to effective job performance.

"(p) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof).".

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end thereof the following new subsection:

"(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—

"(1) An unlawful employment practice based on disparate impact is established under this section when—

"(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

"(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices are required by business necessity, except that—

"(i) if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact; and

"(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in Schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.".

SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) In General.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 4) is further amended by adding at the end thereof the following new subsection:

"(l) Discriminatory Practice Need Not Be Sole Motivating Factor.—Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though such practice was also motivated by other factors.".

(b) Enforcement Provisions.—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: "or, in a case where a violation is established under section 703(l), if the respondent establishes that it would have taken the same action in the absence of any discrimination".

SEC. 6. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 4 and 5) is further amended by adding at the end thereof the following new subsection:

"(m) Finality of Litigated or Consent Judgments or Orders.—

"(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws—

"(A) by a person who, prior to the entry of such judgment or order, had—

"(i) notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person; and

"(ii) a reasonable opportunity to present objections to such judgment or order;

"(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order; or

"(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons consistent with the constitutional requirements of due process of law.

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

"(2) Nothing in this subsection shall be construed to—

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure;

"(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government; or

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction.

"(3) Any action, not precluded under this subsection, that challenges an employment practice that implements a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.".

SEC. 7. STATUTE OF LIMITATIONS; APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.

(a) Statute of Limitations.—Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

(1) by striking out "one hundred and eighty days" and inserting in lieu thereof "2 years";

(2) by inserting after "occurred" the first time it appears "or has been applied to affect adversely the person aggrieved, whichever is later,";

(3) by striking out ", except that in" and inserting in lieu thereof ". In"; and

(4) by striking out "such charge shall be filed" and all that follows through "whichever is earlier, and".

(b) APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.—Section 703(h) of such Act (42 U.S.C. 2000e–2) is amended by inserting after the first sentence the following new sentence: "Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.".

SEC. 8. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(g)) is amended by inserting before the last sentence the following new sentences: "With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k))—

"(A) compensatory damages may be awarded; and

"(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent;

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. If compensatory or punitive damages are sought with respect to a claim arising under this title, any party may demand a trial by jury.".

SEC. 9. CLARIFYING ATTORNEY'S FEES PROVISION.

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)) is amended—

(1) by inserting "(1)" after "(k)";

(2) by inserting "(including expert fees and other litigation expenses) and" after "attorney's fee,";

(3) by striking out "as part of the"; and

(4) by adding at the end thereof the following new paragraphs:

"(2) No consent order or judgment settling a claim under this title shall be entered, and no stipulation of dismissal of a claim under this title shall be effective, unless the parties and their counsel attest to the court that a waiver of all or substantially all attorneys' fees was not compelled as a condition of the settlement.

"(3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order.".

SEC. 10. PROVIDING FOR INTEREST, AND EXTENDING THE STATUTE OF LIMITATIONS, IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) is amended—

(1) in subsection (c), by striking out "thirty days" and inserting in lieu thereof "ninety days"; and

(2) in subsection (d), by inserting before the period ", and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties".

SEC. 11. CONSTRUCTION.

Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following new section:

"SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

"(a) EFFECTUATION OF PURPOSE.—All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.

"(b) NONLIMITATION.—Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to repeal or amend by implication any other Federal law protecting such civil rights.".

SEC. 12. RESTORING PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended—

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end thereof the following new subsection:

"(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.".

SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

SEC. 14. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

(a) Application of Amendments.—The amendments made by—

(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989;

(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989;

(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989;

(4) sections 7(a)(1), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) paragraphs (2) through (4) of section 7(a) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989.

(b) Transition Rules.—

(1) In general.—Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a) (2) through (4), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) Section 6.—Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 6, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 6, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(c) Period of Limitations.—The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 4, 5, 7(a) (2) through (4), or 12.

I. INTRODUCTION

On April 4, 1990, the Committee on Labor and Human Resources, by a vote of 11-5, ordered favorably reported S. 2104, the Civil Rights Act of 1990, with an amendment in the nature of a substitute. Senators voting in favor of the bill were Senators Kennedy, Pell, Metzenbaum, Matsunaga, Dodd, Simon, Harkin, Adams, Mikulski, Jeffords, and Durenberger. Voting against were Senators Hatch, Kassebaum, Coats, Thurmond, and Cochran.

The bill is sponsored by Senator Edward M. Kennedy, chairman of the Committee, and cosponsored by Senators Jeffords, Metzenbaum, Hatfield, Simon, Durenberger, Pell, Packwood, Gore, Mikulski, Adams, Biden, Bingaman, Bradley, Burdick, Cohen, Conrad, Cranston, Dodd, Fowler, Harkin, Inouye, Kerrey, Kerry, Kohl, Lautenberg, Leahy, Levin, Matsunaga, Mitchell, Moynihan, Riegle, Sarbanes, Specter, Wirth, Daschle, Dixon, Glenn, Lieberman, and Sanford.

II. SUMMARY OF THE LEGISLATION

The purpose of the Civil Rights Act of 1990 is to restore and strengthen civil rights laws that ban discrimination in employment. The bill responds to a number of recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of these important federal laws. In addition, the legislation fills certain gaps in Title VII of the Civil Rights Act of 1964 to ensure that all persons enjoy full and adequate protection against employment discrimination.

The Act overrules the Supreme Court's 1989 decision in *Patterson* v. *McLean Credit Union,* 109 S. Ct. 2363 (1989), which held that an 1866 statute guaranteeing all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" (42 U.S.C. section 1981) does not prohibit racial harassment on the job and other forms of race discrimination occurring after the formation of a contract. Section 12 of the Act amends section 1981 to reaffirm that the right "to make and enforce contracts" includes the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship. By restoring the broad scope of section 1981, Congress will ensure that Americans may not be harassed, fired or otherwise discriminated against in contracts because of their race.

The Act also overrules key aspects of the Supreme Court's decision in *Wards Cove Packing Co.* v. *Atonio,* 109 S. Ct. 2115 (1989). For eighteen years following the unanimous landmark decision in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), Title VII had been construed to place on employers the burden of proving that employment practices with a "disparate impact," (*i.e.,* facially neutral practices that operate to exclude qualified women and minorities disproportionately) were required by business necessity. In *Wards Cove,* the Court effectively overruled this *Griggs* rule and held that the employer need no longer prove that its discriminatory practices are required by business necessity. Instead, under *Wards Cove,* victims of discrimination must prove that the discriminatory practices are not significantly related to a legitimate business objective. Sections 3 and 4 of the Civil Rights Act of 1990 restore the *Griggs* rule.

In *Price Waterhouse* v. *Hopkins,* 109 S. Ct. 1775 (1989), the Supreme Court ruled that an employment decision motivated in part by prejudice does not violate Title VII if the employer can show after the fact that the same decision would have been made for nondiscriminatory reasons. Section 5 of the Act responds to *Hop-*

kins by reaffirming that *any* reliance on prejudice in making employment decisions is illegal. At the same time, the Act makes clear that, in considering the appropriate relief for such discrimination, a court shall not order the hiring, retention or promotion of a person not qualified for the position.

In *Martin* v. *Wilks,* 109 S. Ct. 2180 (1989), the Supreme Court held that persons who sat on the sidelines while a consent decree settling a job discrimination suit was approved by a federal district court could later challenge the decree in a separate lawsuit. Section 6 of the Act responds to *Wilks* by encouraging the giving of notice to persons who might be adversely affected by a proposed court order, and a reasonable opportunity to challenge the order. But it would bar subsequent lawsuits challenging the court order, except under certain circumstances.

In *Lorance* v. *AT&T Technologies,* 109 S. Ct. 2261 (1989), the Supreme Court held that the statute of limitations for challenging discriminatory seniority plans begins to run when the plan is adopted, rather than when the plan is applied to harm the plaintiff. As a result, persons who are harmed by discriminatory seniority plans may be forever barred from bringing suit even before the injury occurs. Section 7 of the Act overrules *Lorance* and permits persons to challenge discriminatory employment practices when those practices actually harm them, rather than only when they are adopted.

Section 8 of the Act amends Title VII to grant victims of intentional discrimination the right to recover compensatory damages, and, in egregious cases, punitive damages as well. The Act makes the remedies available for sex, religious and ethnic discrimination under Title VII the same as the remedies now available under section 1981 for race discrimination.

Sections 7 and 10 of the Act extend the statute of limitations in Title VII employment discrimination cases from 180 days to 2 years. In addition, in cases against the federal government, the period for filing suit following final agency action would be raised from 30 to 90 days.

To overrule the Supreme Court's 1986 decision in *Library of Congress* v. *Shaw,* 478 U.S. 310 (1985), the Act amends Title VII to permit prevailing plaintiffs in job discrimination cases against the federal government to recover interest to compensate for delays in obtaining relief.

The Act also includes provisions responding to a series of Supreme Court decisions cutting back on the availability of attorney's fees for prevailing parties in Title VII actions (Section 9).

In response to *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.,* 482 U.S. 437 (1987), the Act confirms that Title VII permits prevailing plaintiffs to recover the reasonable costs incurred for experts who assist them in their case.

In response to *Independent Federation of Flight Attendants* v. *Zipes,* 109 S. Ct. 2732 (1989), the Act makes clear that parties who prevail in job discrimination cases may recover the reasonable attorney's fees they incur in defending the relief obtained in the original proceeding against a subsequent challenge.

In response to *Evans* v. *Jeff D.,* 475 U.S. 717 (1986), the Act provides that a job discrimination case may not be settled through a court order or stipulation of dismissal unless the parties and their counsel attest to the court that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement.

To overrule the Supreme Court's decision in *Marek* v. *Chesny*, 473 U.S. 1 (1985), the Act provides that plaintiffs who reject an offer of judgment more favorable than what is thereafter recovered at trial will not be barred from recovering attorney's fees they incur for services performed after the offer is rejected.

The Act (section 11) also codifies well established rules of construction reaffirming the intention of Congress that civil rights laws must be interpreted consistent with the intent of such laws and construed broadly to provide equal opportunity and effective remedies.

III. HEARINGS

Four hearings were held before the Labor and Human Resources Committee on S. 2104, the Civil Rights Act of 1990. These hearings took place on February 23, February 27, March 1, and March 7, 1990.

On February 23, 1990, the following persons presented testimony: William T. Coleman, Jr., chairman of the board of the NAACP Legal Defense and Education Fund and former Secretary of Transportation; Shirley M. Hufstedler, partner at Hufstedler, Miller, Kaus & Beardsley and former Secretary of Education and judge on the U.S. Court of Appeals for the Ninth Circuit; and F. Ray Marshall, professor at the LBJ School of Public Affairs at the University of Texas and former Secretary of Labor; Charles Fried, Carter Professor of General Jurisprudence at Harvard Law School and former Solicitor General of the United States; Glenn C. Loury, professor of political economy at the Kennedy School of Government at Harvard University; and Brenda Patterson, of Winston-Salem, North Carolina.

On February 27, 1990, the following persons presented testimony: Donald B. Ayer, Deputy Attorney General of the U.S. Department of Justice; Eleanor Holmes Norton, professor of law at Georgetown University Law Center and former Chair of the Equal Employment Opportunity Commission (EEOC); William H. Brown, III, partner in the law firm of Schnader, Harrison, Segal & Lewis in Philadelphia, Pennsylvania, and also a former Chair of the EEOC; Patricia Swanson, of Ingleside, Illinois; David Maddux, representing the National Retail Federation; Lawrence Lorber, representing the National Association of Manufacturers and the Society for Human Resource Management; Judith Lichtman, president of the Women's Legal Defense Fund; and Marcia Greenberger, managing attorney of the National Women's Law Center.

On March 1, 1990, the following persons presented testimony: Ann M. Brunet, a firefighter with the Columbus Fire Department in Columbus, Ohio; Robert Lum, a police sergeant with the New York City Police Department; Nicholas deB. Katzenbach, partner in the law firm of Riker, Danzig, Scherer, Hyland & Perretti in Morristown, New Jersey, and former United States Attorney General; William H. Hudnut III, Mayor of Indianapolis, Indiana, on behalf of the United States Conference of Mayors; Robert Abrams, Attorney General of the State of New York on behalf of himself and Robert Spire, Attorney General of the State of Nebraska; William C. Burns, of Pacific Gas & Electric Company in San Francisco, California; James C. Paras, on behalf of the United States Chamber of Commerce; Paul Andrisani, professor of human resource management at the Temple University School of Business & Management; L. Stanley Chauvin, Jr., President of the American Bar Association; Kingsley R. Browne, associate professor of law at Wayne State University; Cathie A. Shattuck, partner in the law firm of Epstein, Becker & Green in Washington, D.C., and a former Commissioner of the EEOC; and Barry Goldstein, special counsel to Saperstein, Seligman & Mayeda in Oakland, California.

On March 7, 1990, the following persons presented testimony: Richard Arrington, Jr., Mayor of the City of Birmingham, Alabama; Raymond P. Fitzpatrick, Jr., partner in the law firm of Mason & Fitzpatrick in Birmingham, Alabama; James W. Henson, a firefighter with the Birmingham Fire & Rescue Service in Birmingham, Alabama; Laurence H. Tribe, Tyler Professor of Constitutional Law at Harvard Law School; Thomas D. Barr, partner in the law firm of Cravath, Swaine & Moore in New York, on behalf of the Lawyers Committee for Civil Rights Under Law; Glen D. Nager, partner in the law firm of Jones, Day, Reavis & Pogue in Washington, D.C.; and E. Richard Larson, Vice President for Legal Programs of the Mexican American Legal Defense & Education Fund.

Written statements were provided by: Sholom D. Comay, President of the American Jewish Committee; the Associated General Contractors of America, of Washington, D.C.; Nancy Kreiter, Research Director of Women Employed in Chicago, Illinois; the Lawyers Committee for Civil Rights Under Law; the National Education Association; the International Personnel Management Association of Alexandria, Virginia; Richard A. Samp, chief counsel of the Washington Legal Foundation; Ann Klinger, National Association of Counties; People for the American Way, Washington, D.C.; Carl Cook, a firefighter with the Birmingham Fire and Rescue Service in Birmingham, Alabama; the Jefferson County Personnel Board, of Birmingham, Alabama; James P. Alexander, partner in the firm of Bradley, Arant, Ross & White in Birmingham, Alabama; Coy Eklund, former Chairman of the Equitable Financial Companies; Arthur Flemming, Chairman of the Citizen's Commission for Civil Rights; Norman Dorsen, President of the American Civil Liberties Union; Julius LeVonne Chambers, Director of the NAACP Legal Defense and Educational Fund, Inc.; Althea T.L. Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored Persons; Ronald M. Green, partner in the law firm of Epstein, Becker & Green in Washington, D.C.; Robert M. McGlotten, Director, Department of Legislation of the AFL-CIO; Steven Lapinsky, Director of the Minnesota Department of Human Rights Enforcement Division; the Office of the Attorney General, State of Minnesota, on behalf of a group of state Attorneys General; and Robert B. Fitzpatrick, Vice President of the Plaintiff Employment Lawyers Association.

IV. NEED FOR THE LEGISLATION

The Committee, after extensive hearings and thorough consideration, concludes that there exists a compelling need to repair the damage to the federal laws banning employment discrimination caused by the Supreme Court's recent decisions, and to restore and strengthen those laws to provide adequate protections and remedies for victims of such discrimination.

OVERALL IMPACT OF THE SUPREME COURT'S RECENT DECISIONS

The impact of each of the Supreme Court decisions addressed by the legislation is described below. In many respects, however, the overall effect of the Court's decisions is more devastating than the sum of the parts. For more than thirty-five years, since *Brown* v. *Board of Education*, the Supreme Court has played a critical role in the nation's efforts to wipe out discrimination. This role was demonstrated through conscientious application of the Constitution's guarantee to all persons of the "equal protection of the laws," and through generous interpretation of federal civil rights statutes in a manner consistent with their remedial purpose.

In its recent decisions construing these civil rights laws, however, the Court has adopted crabbed, narrow interpretations, signalling an apparent retreat from the Court's historic vigilance for the rights of those who have been victims of prejudice. The impact of this change in approach was well summarized in the testimony of William T. Coleman, Jr., Secretary of Transportation during the Ford Administration, and one of the nation's most highly respected lawyers:

> Since 1954, although slowly and haltingly, the nation has moved ever closer to a society in which blacks are treated as free and equal. . . . For years, as the nation worked through the intractable realities of race discrimination, a synergistic relationship existed between the Supreme Court and the Congress, each building on the contributions of the other. By the time of the 1983 decision in *Bob Jones University* v. *United States*, [461 U.S. 574], Chief Justice Burger could speak with confidence of the consensus, encompassing all three branches of the federal government, that race discrimination—public or private—was contrary to fundamental public policy. That consensus was shared by the vast majority of the American people, who took justifiable pride in the progress the nation had made towards racial justice.
>
> And then in the late spring of 1989, suddenly and inexplicably, the Supreme Court of the United States, which had initiated and contributed so much of this remarkable national consensus, turned in another direction. In a few weeks the Supreme Court handed down a series of decisions that threatened the vitality and enforceability of federal equal employment laws. No one can seriously contend that the statutes at issue were framed in such a manner as to compel these decisions. On the contrary, in virtually every instance, the federal courts, or even the Supreme

> Court itself, had construed the laws in the opposite way. The pattern of these decisions . . . suggests that the Court had abandoned the well-established principle that remedial civil rights statutes ought to be broadly construed. It became all too clear how easily the substance of federal civil rights laws could be strangled in technicalities.

Similarly, former federal appellate judge and Secretary of Education Shirley M. Hufstedler described the Supreme Court's recent decisions as "an enormous step backwards in the enforcement of civil rights legislation."

The cumulative impact of the Court's decisions has been a widening perception among victims of discrimination that the federal courts are no longer hospitable to legitimate civil rights claims. As former Secretary of Labor Ray Marshall testified:

> [M]any of the victims of discrimination feel that the clock is being turned back, and that the nation's policy makers really are not serious about eradicating discrimination. This perception breeds a hopelessness and despair that is very damaging to both the victims of discrimination and to our country. Such perceptions are especially damaging to people who have been the victims of long, deeply entrenched, well documented institutionalized discrimination.

The Court's decisions cannot be justified by any change in circumstances in the nation. Indeed, the Committee finds that discrimination on the basis of race, sex, religion, and national origin persists. As Secretary Marshall testified:

> Although poverty and other factors also are involved in the economic and social disadvantage of minorities, there can be no doubt that discrimination is an important and pervasive part of this constellation of factors.

Discrimination has a devastating impact on women as well as on racial minorities. Marcia Greenberger, managing attorney at the National Women's Law Center, testified that "[s]ex discrimination remains a serious barrier for women seeking equal opportunity in the workplace."

Each of the decisions addressed by the bill requires a legislative response to repair the damage each has caused. Passage of the Civil Rights Act of 1990 is also needed to reaffirm our nation's commitment to ending employment discrimination in all its ugly forms.

THE NEED TO RESTORE THE PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS

The statute known as section 1981 is one of the oldest civil rights statutes. Originally enacted as part of the Civil Rights Act of 1866, section 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and

> proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. 42 U.S.C. sec. 1981.

Many Supreme Court decisions have held that section 1981 prohibits intentional race discrimination in the making and enforcement of private contracts, as well as in state action affecting individuals' ability to make and enforce contracts. *See, e.g., Runyon* v. *McCrary,* 427 U.S. 160, 168 (1976); *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 459–60 (1975); *Tillman* v. *Wheaton-Haven Recreation Ass'n., Inc.,* 410 U.S. 431, 439–40 (1973). The statute is of particular importance for three principal reasons.

First, section 1981 is the only federal law banning race discrimination in all contracts. As such, it has been a critically important tool used to strike down racially discriminatory practices in a broad variety of contexts, including private schools (*Runyon*), community recreation facilities (*Tillman*), hotel lounges (*Wyatt* v. *Security Inn Food & Beverage, Inc.,* 819 F.2d 69 (4th Cir. 1987)), and private recreation facilities (*Scott* v. *Young,* 307 F. Supp. 1005 (E.D. Va. 1969), *aff'd,* 421 F.2d 143 (4th Cir.), *cert. denied,* 398 U.S. 929 (1970)).

Second, unlike Title VII of the Civil Rights Act of 1964, which applies only to employers with 15 or more employees, section 1981 covers employers of all sizes. It thus is the only federal law banning race discrimination applicable to the 3.7 million firms with fewer than 15 employees.

And third, section 1981 authorizes courts to award to successful plaintiffs not only equitable relief, but also compensatory damages, and, in appropriate cases, punitive damages as well. *Johnson,* 421 U.S. at 460. *See* Eisenberg & Schwab, The Importance of Section 1981, 73 Cornell L. Rev. 596 (1988).

In *Patterson* v. *McLean Credit Union,* 109 S. Ct. 2363 (1989), Brenda Patterson sued her employer under section 1981, claiming that her employer had harassed her on the job, failed to promote her, and then discharged her, all because of her race. In a 5–4 decision, the Court adopted an unduly narrow interpretation of section 1981, holding that the provision applies only to discrimination in "the formation of a contract, . . . not to problems that may arise later from the conditions of continuing employment." *Id.* at 2372. "[T]he right to make contracts" on an equal basis with white citizens, the Court ruled, "does not extend . . . to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.* at 2373. The Court thus rejected Patterson's racial harassment claim, and held that she could prevail on her promotion claim only if she could establish that the promotion "involved the opportunity to enter into a new contract with the employer." *Id.* at 2377.

The *Patterson* decision sharply cut back on the scope and effectiveness of section 1981, with profoundly negative consequences both in the employment context and elsewhere. As a result of the decision, the more than 11 million employees in firms that are not covered by Title VII lack *any* protection against racial harassment and other forms of race discrimination on the job.

The news is hardly better for persons whose employers *are* covered by Title VII of the Civil Rights Act. As is discussed in greater detail below, remedies under Title VII are currently limited to equitable relief, including up to two years' backpay. But victims of race discrimination on the job itself, such as harassment and other discriminatory working conditions, frequently do not quit or otherwise accrue claims for lost wages. After the *Patterson* decision, victims of these forms of discrimination may not obtain compensatory or punitive damages under section 1981 and thus lack any means to obtain relief for the harms they have sustained. As a result, no adequate deterrent remains against these highly offensive forms of discrimination.

Since *Patterson* was announced, more than 200 claims of race discrimination have been dismissed by federal courts as a result of the decision. Statement of Julius LeVonne Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. (March 9, 1990). Many persons subjected to blatant bigotry lack any means to obtain relief.

The case of Terrell McGinnis is illustrative. McGinnis brought suit under section 1981 challenging racial harassment and discriminatory conditions at the firm where he was employed. (His firm had fewer than 15 employees and thus was not subject to Title VII). The trial judge found that McGinnis "has suffered many more racial indignities at the hands of the Company than any one citizen should be called upon to bear in a lifetime." *McGinnis* v. *Ingram Equipment Co., Inc.*, 685 F. Supp. 224, 228 (N.D. Ala. 1988), *vacated and remanded,* 888 F.2d 109 (11th Cir. 1989), *vacated and reh'g en banc granted,* 895 F.2d 1303 (11th Cir. 1990).

Included among these indignities were being removed from his foreman's position because of his employer's belief that "it just don't [sic] look right . . . to have a nigger foreman"; being forced to clean restrooms and to prevent black visitors from using the office restrooms; having a gun pointed at his head and being called a "nigger" and "black s.o.b." by his supervisor; being physically abused by his employer on at least two occasions; and, during a business trip lunch break in a restaurant, having his supervisor place his sandwich on the floor and tell McGinnis to retrieve it, saying "Here you go my nigger." 685 F. Supp. at 225–226. Following the *Patterson* decision, a panel of the Court of Appeals for the Eleventh Circuit directed the district court to "reconsider its judgment and award of damages" because "claims of harassment and discriminatory work conditions are no longer actionable under Section 1981." 888 F.2d at 111.[1]

The damage caused by the *Patterson* decision has not been confined to the employment context. Under the ruling, race discrimination after the formation of a contract is no longer prohibited by federal law. To take but one example, a court dismissed a complaint alleging that an insurance company had cancelled an agreement to do repair work at a garage because its owners were black.

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[1] On February 6, 1990, the Court of Appeals vacated the panel's opinion and agreed to rehear the appeal *en banc*.

Rick Nolan's Auto Body Shop, Inc. v. *Allstate Insurance Co.*, 718 F. Supp. 721 (N.D. Ill. 1989). Numerous additional examples can be found. *See* NAACP Legal Defense and Educational Fund, Inc., "The Impact of *Patterson* v. *McLean Credit Union*" 11-14 (Nov. 20, 1989).

The Committee finds that there is a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination in contracts.

THE NEED TO RESTORE THE BURDEN OF PROOF IN DISPARATE IMPACT CASES

Since the adoption of Title VII more than a quarter-century ago, that statute has been the subject of countless judicial decisions. The single most important Title VII decision, both for the development of the law and in its impact on the daily lives of American workers, is *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In a 1971 opinion by Chief Justice Burger, the Supreme Court held unanimously that Title VII forbids not only practices adopted with a discriminatory motive, but also practices which, though adopted without discriminatory intent, have a discriminatory effect on minorities and women. The Court ruled that Title VII barred an employer from requiring a high school diploma or a passing grade on a general intelligence test as a condition of employment or transfer to certain jobs, where both requirements operated to disqualify black applicants at a substantially higher rate than white applicants and neither requirement was shown to be required by business necessity. 401 U.S. at 426.

In so doing, the Court rejected the suggestion that Title VII requires proof of discriminatory intent to invalidate employment practices that operate to exclude minorities from employment:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. 401 U.S. at 432 (emphasis in original).

Title VII, the Court held,

> prohibits not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. *Id.* at 431.

The pervasive harm of the requirements condemned by *Griggs* was readily apparent. When Title VII was enacted, Congress had before it evidence that blacks and other disadvantaged groups frequently fared worse on average on commonly used employment tests.[2] In *Griggs*, the Supreme Court explained that such tests were often an inaccurate measure of the actual ability of blacks because blacks had "long received inferior education in segregated schools." 401 U.S. at 430.

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[2] 110 Cong. Rec. 11251 (remarks of Sen. Tower).

Experience in litigation since *Griggs* also illustrates the adverse and unfair effect that certain facially neutral employment requirements have had on women. In *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), for example, the combined effect of a height and weight requirement excluded approximately 41% of all women from employment as prison guards, but only 0.24% of all men. *Id.* at 329–30 & n.12. During the Committee's hearings, Ann Brunet of the Columbus, Ohio, Fire Department testified that when she first applied for a firefighter's position, not a single woman applicant could score high enough on the physical tests to be hired. After the tests were challenged, and changed to measure the actual requirements of the position, a number of qualified women were hired.

In *Griggs* and its progeny, the courts fashioned a workable and widely accepted set of legal principles for resolving the problems caused by these kinds of employment practices. Those principles were set out in detail in the Supreme Court's 1975 decision in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

Under *Griggs*, *Albemarle* and subsequent cases, analysis of a disparate impact case proceeded in three distinct stages. First, the complaining party was required to establish a prima facie case of discrimination by showing that the tests or other employment practices at issue "select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." 422 U.S. at 425. The complaining party had to prove that the practice had a disparate impact on *qualified* applicants,[3] unless the application process itself was tainted by discrimination, in which case disparate impact on qualified potential applicants was sufficient.

Second, where a prima facie case was established, the burden shifted to the employer to prove that the test or other practice was required by business necessity. *Griggs*, 401 U.S. at 431–32. Third, even if the employer appeared to have met that burden, "it remain[ed] open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest." *Albemarle*, 422 U.S. at 425.

In the past 19 years, the *Griggs* decision has had an extraordinarily positive impact on the American workplace. In hundreds of cases, federal courts have struck down unnecessary barriers to the full participation of minorities and women in the workplace, and employers have voluntarily eliminated discriminatory practices in countless other instances.

These changes have opened up new jobs and careers to millions of Americans. For example, the number of black firefighters in the United States more than doubled in the decade after *Griggs*.[4] In addition, the job of police officer has been opened up to tens of thousands of women and racial minorities. During the Committee's hearings, Robert Lum, a much-decorated sergeant in the New York

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[3] *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 307–08 (1977). While in a disparate impact case the complaining party is challenging the lawfulness of one or more alleged qualifications required by an employer, the complaining party must take into account other bona fide qualifications in establishing a prima facie case.

[4] U.S. Bureau of the Census, Statistical Abstract of the United States: 1984, Table 696 (1983).

City Police Department, who was admitted to the Department only after a minimum height requirement was struck down under *Griggs*, gave eloquent testimony to these changes:

> Through these last 15 years, I believe that I have made some positive contributions to the Police Department and to society. But more important than my contributions, I am forever grateful to have had the opportunity to serve. Many others are also grateful to serve. When I entered the Police Department, there were only 9 other Asian officers. Presently, there are approximately 180 Asian officers. I assure you not all of them are more than 5 feet 7 inches tall. I remind myself now and then that none of this would have been possible if not for a law known as Title Seven . . . .

The changes brought on by the decision have also benefited employers, because the decision prompted them to foresake reliance on unsubstantiated tests and other arbitrary job requirements that excluded large numbers of well qualified individuals from employment or promotion. The beneficial effect on employers of the *Griggs* rule was described by New York State Attorney General Robert Abrams during his testimony before the Committee:

> Because of requirements that *Griggs* imposed, the State devised a selection procedure that better served to identify those truly capable of performing the job and had less discriminatory effects on minorities. Today, New York, like most other Government employers, devotes more resources to the development of job-related selection procedures. *Griggs* has been the catalyst that has brought about this salutary change in public sector employment.

Indeed, among experts who develop and assess employment tests today, there is a consensus that *Griggs* triggered a dramatic improvement in the quality and reliability of selection criteria.[5]

For eighteen years, the implementation of *Griggs* v. *Duke Power Co.* was one of the great success stories in American law. Yet in June 1989, a five-member majority of the Supreme Court cut back drastically on the scope and effectiveness of *Griggs*. The Court's opinion in *Wards Cove Packing Co.* v. *Atonio,* 109 S. Ct. 2115 (1989), overturned in a number of major respects the long accepted legal principles governing disparate impact cases established under *Griggs*. The changes wrought by the *Wards Cove* decision are described below.

Burden of proof

The *Wards Cove* decision shifted from the employer to the complaining party the burden of establishing whether a practice with a disparate impact is justified. This sharp turnabout in the law overturns eighteen years of consistent precedent in the Supreme Court and the lower federal courts.

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[5] *See, e.g.*, Hearing of the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess., 209 (Oct. 2, 1985) (testimony of Dr. Leonard Goodstein).

Prior to *Wards Cove,* it was widely understood and accepted that the burden of proof with regard to business necessity was on the employer seeking to justify a practice shown to have a disparate impact. In *Griggs,* the Supreme Court held unanimously that—

> Congress has placed on the employer the *burden of showing* that any given requirement must have a manifest relationship to the employment in question. 401 U.S. at 432 (emphasis added).

Similar formulations have repeatedly been used by the Supreme Court. In *Albemarle Paper,* the Court emphasized that an employer must "meet the *burden of proving* that its tests are 'job related.' " 422 U.S. at 425 (emphasis added). In *Dothard* v. *Rawlinson,* the Court insisted that an "employer *prov[e]* that the challenged requirements are job related." 433 U.S. at 329 (emphasis added). And in *Connecticut* v. *Teal,* the Court held that an "employer must . . . *demonstrate* that 'any given requirement [has] a manifest relationship to the employment in question.' " 457 U.S. 440, 446 (1982) (quoting *Griggs,* 401 U.S. at 432) (emphasis added).

Lower court decisions applying *Griggs* emphasized that the burden of persuasion was on the employer, not the plaintiff. The point was made in virtually every way it could be stated. These decisions insisted that the employer bore the "burden of proof"; that the employer bore the "burden of persuasion," or that the employer was obligated to "prove," "demonstrate," "establish" or "show" that a disputed practice was required by business necessity. Former Secretary of Transportation William T. Coleman, Jr. offered a list of more than 200 such decisions made by the lower courts between *Griggs* and *Wards Cove.*

This allocation of the burden of proof is also reflected in a number of Department of Justice regulations.[6] Indeed, as recently as November 1987 the Department of Justice's position was that in a Title VII case the employer bore the burden of proof as to business necessity.[7]

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[6] For example, the regulations implementing the nondiscrimination provisions of the Justice System Improvement Act of 1979 provide that the Act "shall be interpreted . . . consistently with Title VII" 28 C.F.R. sec. 42.203(c) (1989). The Appendix to this regulation explains:

> This section . . . clarifies that the burden shifts to the employer to validate its selection procedures once [the Department] has demonstrated that those procedures disproportionately exclude an affected class. 28 C.F.R. Pt. 42, subpt. D, App. A (1989).

Another Justice Department regulation, also implementing the JSIA provides:

> The use of a minimum height or weight requirement which operates to disproportionately exclude women and persons of certain national origins, such as persons of Hispanic or Asian descent, is a violation of this subpart, unless the recipient is able to demonstrate convincingly, through use of supportive factual data, that the requirement has been validated as set forth in the Department of Justice Guidelines on Employee Selection Procedures . . . 28 C.F.R. sec. 42.203(d) (1989).

The Justice Department's regulations also place on an employer the burden of demonstrating the job-relatedness of the employment test or criterion with an adverse impact on handicapped persons. 28 C.F.R. sec. 42.512(a) (1989).

[7] Throughout its *amicus curiae* brief on behalf of the United States in *Watson* v. *Forth Worth Bank & Trust,* the Department stated:

> "[I]n *Griggs* . . . the Court said 'Congress has placed on the employer the *burden of showing* that any given requirement . . . ha[s] a manifest relationship to the employment in question.' " Brief for the United States as Amicus Curiae at 7–8, *Watson* v. *Fort Worth Bank & Trust,* 487 U.S. 977 (1988) (No. 86–6139) (quoting *Griggs,* 401 U.S. at 432) (emphasis added).
>
> "[A]n employer must *show* that the device challenged is 'demonstrably a reasonable measure of job performance.' " *Id.* at 18 (quoting *Griggs,* 401 U.S. at 436) (emphasis added).
>
> "[A]n employer ordinarily must . . . *demonstrate* . . . that the selection process has a sufficient connection with effective job performance or efficient business operation." *Id.* at 18–19 (emphasis added).

The *Wards Cove* decision unequivocally overturned this long prevailing allocation of the burden of proof of business necessity. The Court ruled that once a complaining party establishes that an employment practice has a disparate impact, the employer has the burden of *production*, but not the burden of *persuasion* in justifying the practice.

> [T]he employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff. To the extent that the [court of appeals] held . . . that the persuasion burden should shift to the [employer] once the [plaintiffs] established a prima facie case of disparate impact—its decisions were erroneous. 109 S. Ct. at 2126.

The circuit courts have recognized that this aspect of *Wards Cove* represented a dramatic departure from longstanding precedent. In *Hill* v. *Seaboard Coast Line Railroad Co.*, 885 F.2d 804, 812 n.12 (11th Cir. 1989), the U.S. Court of Appeals for the Eleventh Circuit commented that "[t]he Supreme Court's decision in *Wards Cove* made clear that the employer merely has the burden of production . . . and overruled the existing law in this circuit on this issue." The Seventh Circuit took a similar view in an opinion by Judge Richard Posner:

> *Wards Cove* . . . modified the ground rules that most lower courts had followed in disparate-impact cases. Before *Wards Cove* it was generally believed that if the plaintiff in a Title VII case showed . . . that a criterion . . . was disproportionately excluding members of a group protected by the statute, . . . the burden shifted to the employer to persuade the judge . . . that the criterion . . . was necessary to the effective operation of the employer's business . . . *Wards Cove* returns the burden of persuasion to the [employee], while leaving the burden of production on the employer. *Allen* v. *Seidman*, 881 F.2d 375, 377 (7th Cir. 1989) (citations omitted).

In our legal system, the determination of which party should bear the burden of proof of a particular fact should be based on such common-sense considerations as which party has access to the underlying information and which party is arguing for an unexpected result. *See Teamsters* v. *United States*, 431 U.S. 324, 359 n.45 (1977) ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof.") *See also* James, Burdens of Proof, 47 U.Va. L. Rev. 51 (1961).

It is clear that *Griggs* properly allocated the burden of proof in disparate impact cases, and that *Wards Cove* does not. The employer typically designs, evaluates and modifies job requirements, and thus is in the best position to know what practices are required by business necessity. Individual employees or potential employees are in a far worse position to obtain meaningful information on job requirements and performance. Moreover, it is virtually impossible for employees to prove a negative: that there is no business justification for an employment practice.

Thus, as a result of the *Wards Cove* decision, victims of discriminatory employment practices will find it far more difficult to prove their claims. In all but the rarest of instances, the evidence regarding the existence of an adequate justification for an exclusionary practice is in the possession of the employer, the party which adopted the practice. The employer is far more familiar with its own operations and with the proper requirements needed for the job at issue. And the employer has access to the records needed to produce the evidence of business necessity. To make the party challenging a discriminatory practice bear the burden of persuasion on business necessity is unfairly burdensome and inefficient.

For these reasons, the Committee finds that there is a compelling need to restore to the employer the burden of persuasion on business necessity.

Required justification of practices with a disparate impact

Before *Wards Cove*, there was a consensus that when a complaining party demonstrated that an employment practice had a disparate impact, the practice was unlawful unless it was required by business necessity. In *Griggs* itself, the Court held that Title VII requires

> the removal of . . . unnecessary barriers to employment when the barriers operate invidiously to discriminate. . . . The Act proscribes not only overt discrimination but practices that are fair in form, but discriminatory in operation. *The touchstone is business necessity.* 401 U.S. at 431 (emphasis added).

Similarly, in *Dothard* v. *Rawlinson*, the Supreme Court reiterated that Title VII mandated removal of "unnecessary barriers," and held unlawful the requirements there at issue because they were not "essential to effective job performance." 433 U.S. at 328, 331-32 & n.14. And the Court in *Connecticut* v. *Teal* emphasized the statutory directive for the elimination of "unnecessary barriers" to the employment or promotion of minorities or women. 457 U.S. at 447.

The lower courts took literally and seriously the phrase "business necessity." There are scores of district and circuit court disparate impact cases using the words "business necessity" to describe what an employer must establish once a prima facie case has been shown. An Eighth Circuit decision is illustrative:

> [T]he proper standard . . . is not whether it is justified by routine business considerations but whether there is a *compelling need* for . . . that practice.[8]

But *Wards Cove* overruled this widely accepted and applied formulation. The majority opinion clearly disavowed any requirement of business necessity, stating:

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[8] *EEOC* v. *Ruth Packing Co.*, 787 F.2d 318, 331 (8th Cir.) (emphasis in original), *cert. denied*, 479 U.S. 910 (1986).

> [T]here is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster. 109 S. Ct. at 2126.

While under *Griggs*, the "touchstone" was "business necessity," under *Wards Cove*, "[t]he touchstone . . . is a reasoned review of the employer's justification" to determine "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 2125-26.

Thus, under the new rule articulated by the majority in *Wards Cove*, the business purpose served by an employment practice—even a practice that excludes virtually all minorities or women from employment or promotion—need not be necessary, essential or important. Under *Wards Cove*, any purpose—so long as it is legitimate and not "mere[ly] insubstantial"—will suffice. *Id.* at 2126.

The lower courts have recognized that *Wards Cove* significantly reduced the justification required for an employment practice shown to cause a disparate impact. Writing for the Seventh Circuit in *Allen* v. *Seidman*, Judge Posner observed that *Wards Cove* permitted the use of any practice that excludes women or minorities so long as it is not unreasonable, and added that:

> *Wards Cove* . . . dilutes the "necessity" in the "business necessity" defense. . . . [T]he "business necessity" defense [is] now a misnomer, since the "defense" does not require a showing of necessity and is no longer an affirmative defense. 881 F.2d 375, 377 (7th Cir. 1989).

The weak standard adopted by the *Wards Cove* majority seriously undermines the effectiveness of Title VII. The Court's ruling means that exclusionary employment practices that are *not* necessary for effective job performance are permissible, so long as those practices significantly serve any legitimate business objective. As a result, unnecessary barriers to full participation by minorities and women in our workforce will persist.

For eighteen years, the *Griggs* rule of business necessity operated to remove these unnecessary barriers. The Committee finds that there is a compelling need to overrule the *Wards Cove* decision and to restore the *Griggs* rule.

Use of multiple selection criteria

Employers at times rely on only a single test or other requirement to screen job applicants or employees seeking promotions. Where employers use several such practices to make an employment decision, the impact of each on qualified women or minorities is often readily apparent. In some instances, however, where multiple criteria are used, and the ultimate employment decision clearly has a disparate impact on qualified minorities or women, a complaining party may be unable to ascertain which factor or factors in that decision were responsible for the disparate impact. Under *Wards Cove*, it will no longer be possible to maintain a disparate impact claim at all in such a situation.

Before *Wards Cove*, the Supreme Court had repeatedly indicated that there was no need for a plaintiff to prove the extent to which each of several employment practices might have contributed to an employment decision with a proven discriminatory effect. In *Griggs* itself, for example, the company required employees to pass two separate tests to transfer into certain desirable jobs. 401 U.S. at 428. In finding the existence of disparate impact, the Court referred to evidence that blacks fared less well than whites on "a battery of tests" that included those two tests. *Id.* at 430 n.6. Significantly, Chief Justice Burger made no mention of any data regarding the distinct impact of each such test.

A number of federal circuit courts did address this issue, however. They held that a plaintiff could prove disparate impact with evidence as to the end result of a multi-factor employment decision, without having to isolate the distinct impact of each component of the decision.[9]

In its brief in *Wards Cove,* the Department of Justice argued that a plaintiff should not be required to establish which component of such a decision had a disparate impact where it is not posible to identify which component is responsible for the discriminatory effect:

> [A] decision rule for selection may be complex: it may, for example, involve consideration of multiple factors. And certainly if the factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole. Brief for the United States as Amicus Curiae at 22, *Wards Cove Packing Co.* v. *Atonio,* 109 S. Ct. 2115 (1990) (No. 87-1387).

In *Wards Cove,* however, a 5-4 majority of the Supreme Court repudiated these prior precedents and rejected the argument of the Justice Department. The Court's opinion places on the complaining party in a disparate impact case the absolute obligation to demonstrate which component or components of a multi-factor employment decision process had a disparate impact, and how great that impact was, even where the employer's failure to maintain adequate data may make it impossible for the complaining party to meet that burden. According to the *Wards Cove* majority, proof that the total selection process had a disparate impact—

> alone will *not* suffice to make out a prima facie case of disparate impact. [Plaintiffs] will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices . . ., specifically showing that each challenged practice has a significantly disparate impact on employment opportunities. . . . 109 S. Ct. at 2125 (emphasis in original).

The majority expressly noted that the defendant in *Wards Cove* had no obligation to collect or retain the very data that would be needed to identify the specific factor responsible for the disparate impact.[10]

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[9] *See, e.g., Green* v. *USX Corp.*, 843 F.2d 1511, 1520-25 (3rd Cir. 1988), *vacated,* 109 S. Ct. 3151 (1989), *on remand,* 896 F.2d 801 (3rd Cir. 1990); *Griffin* v. *Carlin,* 755 F.2d 1516, 1523 (11th Cir. 1985); *Segar* v. *Smith,* 738 F.2d 1249, 1270-71 (D.C. Cir. 1984); *Johnson* v. *Uncle Ben's, Inc.*, 628 F.2d 419, 426-27 (5th Cir. 1980), *vacated,* 451 U.S. 967 (1981), *modified and aff'd in part, rev'd in part,* 657 F.2d 750 (5th Cir. 1981), *cert. denied,* 459 U.S. 967 (1982).

[10] 109 S. Ct. at 2125 n.10. In his dissent, Justice Stevens noted that in *Wards Cove* itself the evidence which the plaintiff would need to meet this burden clearly did not exist. 109 S. Ct. at 2133 n.20.

A subsequent decision in the Eleventh Circuit observed that *Wards Cove* had overturned what had until June 1989 been the prevailing law in that circuit regarding this issue.[11]

The inequity and unfairness caused by this aspect of the *Wards Cove* decision is clear. The employer has selected the factors that combine to produce the employment decision that has the disparate impact, and thus has far better access to data concerning the impact of each practice involved in the employment decision. But the majority's decision places on the individual employee the severe and inappropriate burden of demonstrating the extent to which each practice involved in a multi-practice employment decision causes a disparate impact.

As former United States Attorney General Nicholas deB. Katzenbach, who was also formerly Senior Vice-President and General Counsel of International Business Machine Corporation, testified, "[o]f the two parties, it is the employer—with intimate knowledge of its operations and ready access to its records—which is in the better position to resolve these issues."

Similarly, former Secretary of Transportation William T. Coleman, Jr. correctly observed that *Wards Cove* offers unscrupulous employers a road map for avoiding the *Griggs* rule:

> Where an employer's practices have a proven disparate impact, the employer under *Griggs* faces a duty to justify that impact. *Wards Cove* permits an employer to evade that duty simply by failing to keep records revealing which of several combined practices did and did not have a disparate impact. Such a rule creates a perverse incentive for employers to avoid keeping such records, and encourages them to use multiple requirements whose individual impact cannot readily be distinguished.

The Committee finds that there is a compelling need for legislation to overturn this *Wards Cove* rule.

THE NEED TO PROHIBIT ALL IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES

When Congress enacted the Civil Rights Act of 1964, it intended to preclude all invidious consideration of a person's race, color, religion, sex or national origin in employment. The effectiveness of Title VII's ban on discrimination on the basis of race, color, religion, sex or national origin has been severely undercut by the recent Supreme Court decision in *Price Waterhouse* v. *Hopkins,* 109 S. Ct. 1775 (1989). In that case, the plaintiff, Ann Hopkins, sued her employer, an accounting firm, alleging that she was unlawfully denied a promotion because of her sex.

Hopkins was denied the promotion despite the fact that she had brought the firm more business than any of the 87 men being considered for partnership at the time. She was told by one partner that her professional problems would be solved if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 1782.

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[11] *Hill* v. *Seaboard Coast Line R.R. Co.*, 885 F.2d 804, 813 n.16 (11th Cir. 1989) ("The plaintiffs' disparate impact claim also might founder on the requirement that they specify the particular employment practice that has caused any disparity. *Wards Cove* v. *Atonio*. . . . At the time of the trial in this case, March 1983, the law in this circuit required the defendant, not the plaintiff, to identify the various practices resulting in the promotion decisions.")

The district court found that Title VII had been violated because sex discrimination had been a factor in the firm's refusal to promote Hopkins, but ruled that the employer could avoid equitable relief—promotion to the partnership—if it could prove that Hopkins would have been denied partnership in the absence of discrimination. The court of appeals took a different approach, holding that an employer who permitted discrimination to play a role in an employment decision may escape all liability under Title VII if it could prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination.

The issue before the Supreme Court thus was what effect to give to evidence that the employer may also have had nondiscriminatory reasons for denying Hopkins a place in the partnership. The Department of Justice under President Reagan argued on behalf of the United States that Title VII was violated whenever a discriminatory motive was a cause of an employment decision. Proof that an employer would have made the same decision for a nondiscriminatory reason, the Justice Department argued, did not erase the violation, but merely limited the appropriate remedy.[12]

Prior case law supported the Department's view that a finding of invidious motivation was dispositive of the question of liability, leaving open only the scope of the appropriate remedy.[13] But the Supreme Court rejected the Department's position. The plurality opinion, by Justice Brennan, held that "when a plaintiff . . . proves that her gender played a motivating part in an employment decision, *the defendant may avoid a finding of liability* . . . by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." 109 S. Ct. at 1795 (emphasis added). *See also id.* at 1786 ("We conclude that the preservation of [an employer's freedom of choice] means that an employer *shall not be liable* if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particluar person." (emphasis added)).

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[12] In its brief in the Supreme Court, the Justice Department argued that where an employer shown to have acted for a discriminatory reason proved that it would have taken the same action for a second, lawful reason, that demonstration should operate only to limite the appropriate remedy, not to permit the employer to escape liability altogether:

> [I]t is proper to place the burden on the defendant to prove that a give given employment decision would have been the same in a discrimination-free environment. If the defendant makes such a showing, the plaintiff is made whole by an award of attorney's fees and an injunction against future discrimination. In effect, the defendant is ordered to cease discriminatory activity, which enhances the plaintiff's employment opportunities in the future. But the defendant need not hire, reinstate, promote or provide backpay to the plaintiff. . . . Title VII . . . should be construed to allow the defendant in a disparate treatment case to prove that, because the adverse employment decision would have been made in any event for legitimate, nondiscriminatory reasons, the plaintiff will be made whole by an award of attorney's fees and an injunction against future discrimination. Brief for the United States as Amicus Curiae at 23-24, *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989) (No. 87-1167) (citations omitted).

[13] *See, e.g.*, *Bibbs* v. *Block*, 778 F.2d 1318 (8th Cir. 1985); *King* v. *Trans World Airlines, Inc.* 738 F.2d 255 (8th Cir. 1984); *Ostroff* v. *Employment Exchange Inc.*, 683 F.2d 302 (9th Cir. 1982); *Nanty* v. *Barrows Co.*, 660 F.2d 302 (9th Cir. 1981); *Roberts* v. *Fri*, 29 F.E.P. Cases 1445 (D.C. Cir. 1980).

The inevitable effect of the *Price Waterhouse* decision is to permit prohibited employment discrimination to escape sanction under Title VII. As former Secretary of Transportation William T. Coleman, Jr. testified, the Court's ruling "means that if a court in an individual Title VII case finds that the defendant has clearly engaged in intentional discrimination, the Court is powerless to end that abuse if the particular plaintiff who brought the case would have suffered the disputed employment action for some legitimate, alternative reason."

The practical significance of *Price Waterhouse* is illustrated by a situation in which the same decision is made, independently but simultaneously, by two different company officials. Suppose, for example, a female job applicant were rejected by a foreman who announced that he would never hire a woman, that the position was for men only, and that he did not care that federal law forbids discrimination on the basis of sex. *Price Waterhouse* would permit the employer to avoid all liability under Title VII if, unbeknownst to the bigoted foreman, another personnel officer had imposed a hiring freeze because of a lack of business. In such a case, the court under *Price Waterhouse* could not enjoin the employer from engaging in future discrimination.

Judith Lichtman, president of the Women's Legal Defense Fund, summarized the impact of the decision as follows:

> [U]nder *Price Waterhouse*, Title VII's statutory objectives will be undermined as employers' discriminatory conduct escapes liability and victims of discrimination receive no redress. Unless clarified to be consistent with the legislative purposes of Title VII, this decision will result in proven yet unremedied instances of gender, racial, color, religious, and national origin prejudice—prejudice, in effect, excused and condoned by the courts.

The impact of the decision is particularly profound because the factual situation at issue in *Price Waterhouse* is a common one. As the Justice Department correctly observed, "[v]irtually every Title VII disparate treatment case will to some degree entail multiple motives." Brief for the United States as Amicus Curiae, *supra* at 6; *see also id.* at 16.

If Title VII's ban on discrimination in employment is to be meaningful, proven victims of discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. *Price Waterhouse* jeopardizes that fundamental principle. As Judith Lichtman testified, the decision "sends a message that a little overt sexism or racism is okay, as long as it was not the only basis for the employer's action." Legislation is needed to restore Title VII's comprehensive ban on all impermissible consideration of race, color, religion, sex or national origin in employment.

FACILITATING PROMPT AND ORDERLY RESOLUTION OF EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS

Since enactment of the Civil Rights Act of 1964, hundreds of employment discrimination cases have been resolved through adoption of court decrees. Many of those decrees require employers to take actions in the future that may adversely affect the interests of persons who were not parties to the proceedings in which the decrees were adopted. In numerous instances, persons who were aware of the proceedings in which a court decree resolving an employment discrimination claim was entered have sought to challenge the decree in a separate lawsuit.

The history of litigation involving the Birmingham, Alabama, Fire and Rescue Squad is illustrative. In 1974 and 1975, suits were filed by two groups of private parties and the United States, alleging that the City of Birmingham and the Jefferson County Personnel Board had discriminated against blacks in the hiring and promotion of firefighters and other City employees. In 1981, after two trials and judicial findings of race discrimination against blacks in the Fire Department, consent degrees were entered providing for goals for the hiring and promotion of blacks within the Fire Department and other City Departments. The district court entered an order provisionally approving the decrees and directing publication of notice of an upcoming fairness hearing. Notice of the hearing was given to all interested persons informing them of the general provisions of the decrees and of their rights to file objections.

At the hearing, the Birmingham Firefighters Association (BFA) appeared as *amicus curiae* and filed objections, alleging that the decree would violate the rights of white firefighters. After the hearing, but before final approval of the decrees, the BFA and two of its members also moved to intervene. The district court approved the decrees, holding that they were "well within the limits upheld as permissible" in *Steelworkers* v. *Weber*, 443 U.S. 193 (1979), and other cases. At the same time, the district court also denied the motions to intervene as untimely. *United States* v. *Jefferson County*, 28 FEP Cases 1834 (N.D. Ala. 1981).

Eight months after entry of the decrees, seven white firefighters, also BFA members, filed a complaint for injunctive relief, claiming that the decrees illegally discriminated against them. The district court denied relief. Finding that the white plantiffs knew at an early stage of the proceedings that their rights could be adversely affected, the Eleventh Circuit affirmed both the denial of intervention and the denial of injunctive relief. *United States* v. *Jefferson County*, 720 F.2d 1511, 1519-20 (11th Cir. 1983). In so doing, the Eleventh Circuit indicated that the firefighters could file a separate Title VII suit to challenge specific violations of their rights.

Several other groups of white firefighters and other City employees brought lawsuits, claiming that they were being denied promotions pursuant to the decree because of their race. After trial on some of the claims, the district court dismissed those claims on two grounds. First, the court ruled that since the promotions were required by the decrees, there was no illegal discrimination against the white firefighters. And second, the court ruled that the decree was not susceptible to collateral attack. On appeal, the Eleventh Circuit reversed, allowing the collateral attack. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987). In *Martin* v. *Wilks*, 109 S. Ct. 2180 (1989), the Supreme Court affirmed the Eleventh Circuit's decision permitting collateral attack on the court decree.

Prior to the Supreme Court's decision, the "great majority of the federal courts of appeals" barred persons who were aware that a lawsuit might affect their interests, but who failed to intervene in a timely fashion to challenge the entry of a court decree, from filing a separate lawsuit challenging the decree. *Id.* at 2185 & n.3. In *Wilks*, the Supreme Court ruled otherwise, holding that nothing in Title VII or the Federal Rules of Civil Procedure bars such a person from filing a subsequent lawsuit to challenge a court decree.

Under the *Wilks* decision, a new employment discrimination suit may be filed against an employer whenever that employer hires or promotes an individual pursuant to a court decree. As former federal appellate judge Shirley Hufstedler testified during the Committee's hearings, "[t]he result is, and it is very well documented, that now there is no possibility of any finality with respect to a decree in a Title VII case which is rendered either following lengthy negotiations and consent or after a fully litigated case."

In the months since the decision, new suits challenging long-settled court decrees in employment discrimination cases have been filed in more than a dozen localities, including Birmingham, Boston, Toledo, San Francisco, and Cincinnati. Lawyers' Committee for Civil Rights Under Law, "Impact of the Supreme Court Decision in *Martin* v. *Wilks*" (Feb. 20, 1990). The devastating impact of these new suits to reopen old decrees was eloquently described during the Committee's hearings by Birmingham Mayor Richard Arrington:

> Birmingham's history of *de jure* segregation and discrimination against Blacks is well-known. Because of such discrimination, Birmingham did not hire its first black police officer until 1966; its first black firefighter was hired in 1968; its second black firefighter was hired in 1974. By the time we entered into the 1981 consent decree, only 13 percent of our police officers and only 9 percent of our firefighters were black in a city that was predominantly black.
>
> Since 1981, with the aid of the consent decree, Birmingham has made great strides toward overcoming its long history of race discrimination and has made substantial progress toward becoming a harmonious biracial city, economically and socially vibrant. As a son of Birmingham and as Mayor of the City of Birmingham, I am especially proud of our people and of this dramatic progress that we have made in a very short period of time.
>
> But the progress is being impeded, and it is even being threatened by the continued litigation revolving around the consent decree and *Martin* v. *Wilks*. . . .
>
> [S]uch litigation can only serve to discourage the eradication through voluntary affirmative action of discrimination in the private sector in and around our city. The city's experience is certainly not one employers would wish to undergo no matter how committed they may be to equal employment opportunity.

While ensuring finality and repose are important goals for the law generally, they are particularly important in the area of employment discrimination litigation, because suits reopening decrees frequently have a divisive impact on the community.

The Committee finds that legislation is clearly needed to provide for reasonable procedures for prompt and orderly resolution of challenges to consent decrees. Under the *Wilks* decision, if the parties to a lawsuit wish to bind other persons to a judgment resolving that suit, they must join them as additional parties to the suit. 109 S. Ct. at 2185–86. Thus, if the City of Birmingham and the original black plaintiffs wanted to obtain a court decree finally determining how the fire department would make hiring and promotion decisions, they must join as parties to the litigation not only every person currently employed by the department, but also *every person* who might seek to be hired or promoted by the department during the pendency of the decree.

The inefficiency and unfairness of the *Wilks* rule are obvious. The City of Birmingham has incurred over $1 million in legal fees defending the 1981 consent decree. To achieve a measure of finality in the resolution of a divisive employment discrimination suit, every potential firefighter—no matter how remote or abstract his or her interest might be—must be served with a summons, and permitted to appear with counsel to participate in full as a party in the proceedings. The inevitable result of such a rule will be needless complexity and expense, and the entry of fewer consent decrees resolving employment discrimination claims. Without remedial legislation, Congress's intent in adopting Title VII of "encouraging voluntary settlement of employment discrimination claims" [14] will be frustrated.

NEED TO CLARIFY AND EXTEND THE STATUTE OF LIMITATIONS

Commencement of running of the statute of limitations

Legislation is needed to address the problems created by the Supreme Court's decision in *Lorance* v. *AT&T Technologies*, 109 S. Ct. 2261 (1989). The plaintiffs in *Lorance* alleged that a seniority rule governing layoffs had been adopted for the purpose of discriminating against women. The seniority rule at issue was first adopted in 1979. The seniority rule was not applied until the fall of 1982, when the company invoked it to lay off Lorance and the other plaintiffs. The plaintiffs promptly filed Title VII charges with the EEOC, asserting that the rule applied to them in 1982 had been motivated by discrimination.

A divided Supreme Court ruled that the complaint in *Lorance* was untimely. The majority held that where an employer adopts an employment rule for discriminatory reasons, the limitations period for the filing of a Title VII charge begins to run as soon as the rule is adopted. Under the Court's decision, a person wishing to challenge a discriminatory rule must do so when the rule is adopted, even though the rule may not actually be applied to that person, or anyone else, until years later.

The unfairness and impracticality of the *Lorance* rule are apparent. It would require employees seeking to protect their interests to challenge immediately any new rule or practice that might conceivably be applied to adversely affect them in the future, or lose forever the right to do so. If employees were to follow the course of action required by the decision, they would be required to bring suit when they had not suffered any real injury, because the rule or practice had not been applied to affect them adversely. This would create an unfair trap; courts may well find that the plaintiffs lack standing to bring such suits, or that the suits should otherwise be dismissed for lack of ripeness.[15]

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[14] *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

The decision in *Lorance* requires employees to bring lawsuits against their employers or unions, possibly poisoning their relations with both, even though such potentially destructive litigation may be entirely unnecessary. As the Justice Department observed regarding the rule adopted by the *Lorance* majority:

> [E]mployees would be required to take the drastic action of suing their employer before they could know if they would ever suffer any concrete injury from operation of the seniority system. . . .
>
> The employee . . . is faced with a Hobson's choice either to bring what may be an unnecessary and premature lawsuit against his employer, to the detriment of the employment relationship, or to forgo any possibility of recovery in the event that the plan ever should operate to injure him. Brief for the United States as Amicus Curiae at 8, 24, *Lorance* v. *AT&T Technologies,* 109 S. Ct. 2261 (1989) (No. 87-1428).

Lorance has already been applied beyond the context of challenges to seniority plans. The decision has been held to bar a challenge to an allegedly discriminatory promotion policy unless the challenge is made at the time the policy is adopted, rather than when it was applied to deny a promotion to the claimant. *Davis* v. *Boeing Helicopter Co.,* 1989 WL 127509 (E.D. Pa. 1989).

Taken to its logical conclusion, the *Lorance* rule would bar all challenges to contemporary applications of discriminatory rules adopted prior to 1965—that is, all the discriminatory rules in existence when Title VII became effective—because the deadline for a timely charge would have expired before Title VII ever came into effect. The Department of Justice argued in *Lorance* that under the interpretation of Title VII ultimately adopted by the majority:

> all seniority systems adopted prior to the enactment of Title VII would be immune from challenge. . . . [I]t cannot plausibly be supposed that Congress intended such a bizarre result. Brief for the United States as Amicus Curiae at 23, *Lorance* v. *AT&T Technologies,* 109 S. Ct. 2261 (1989) (No. 87-1428).

The Committee finds that there is a compelling need for legislation to overrule the *Lorance* decision.

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[15] *See Allen* v. *Wright,* 468 U.S. 737 (1984); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967).

Providing for comparable statutes of limitations for all discrimination claims

Current law provides for a generally longer statute of limitations for claims of intentional race discrimination than for other forms of discrimination in employment. Title VII provides that an employment discrimination claim against a party other than the federal government must be filed within 180 days. But under 42 U.S.C. sec. 1981, which bars intentional race discrimination in contracts, victims have a longer period of time to commence suits. The statute of limitations for these actions, while it varies by state, is typically two or three years. *See, e.g. Goodman* v. *Lukens Steel Co.*, 107 S. Ct. 2617 (1987) (two years); *Runyon* v. *McCrary*, 427 U.S. 160 (1976) (two years); *Gordon* v. *National Youth Work Alliance*, 675 F.2d 356 (D.C. Cir. 1982) (three years).

Thomas Barr, a partner with Cravath, Swaine, & Moore, testifying on behalf of the Lawyers Committee for Civil Rights, stated that:

> Title VII's existing statute of limitations period for filing charges, while intended to encourage prompt resolution of discrimination, has in practice hampered such resolution. . . . [M]any potentially meritorious claims are time-barred.

Thus, under current law, victims of race discrimination may still commence suit after the 180 days allowed by Title VII while victims of other sorts of discrimination find their claims time-barred. The Committee finds that discrimination based on sex, religion, or national origin, is no less reprehensible than race discrimination. In view of this, the Committee finds that there is a strong need to change the statute of limitations in Title VII to bring it more closely in line with the statute of limitations allowed by section 1981.

In addition, under current law, plaintiffs with Title VII claims against the federal government must file lawsuits within thirty days after notice of final action by the government agency or the EEOC. This extremely brief period renders many plaintiffs unable to vindicate their right to be free from discrimination. The Committee finds that there is a strong need to extend this time period.

THE NEED FOR DAMAGES AS A REMEDY FOR ALL FORMS OF INTENTIONAL DISCRIMINATION

A serious gap exists in Title VII, one that leaves victims of intentional discrimination on the basis of sex, religion or national origin without an effective remedy for many forms of bias on the job, while victims of intentional race discrimination in employment have such a remedy. Title VII, which prohibits discrimination on the basis of race, color, religion, sex, or national origin, permits a court to award equitable relief, including injunctive relief, reinstatement or hiring, with up to two years' backpay;[16] but the statute does not permit the award of compensatory or punitive damages.

By contrast, 42 U.S.C. section 1981 authorizes courts to award to victims of intentional race discrimination in contracts not only equitable relief, but also compensatory damages, and in appropriate cases, punitive damages as well. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). *See also* Eisenberg & Schwab, The Importance of Section 1981, 73 Cornell L. Rev. 596 (1988); *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363, 2375 n.4 (1989).

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[16] Section 706(g) (42 U.S.C. sec. 2000e-5(g)).

Victims of sexual or religious harassment and other intentional discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering while on the job. This distress often manifests itself in emotional disorders and medical problems. And victims of discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies. Limiting relief to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination; and thus victims of intentional discrimination are discouraged from seeking to vindicate their civil rights.

As the court observed in *Mitchell* v. *OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986):

> There is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit. One can expect that a potential claimant will pause long before enduring the humiliation of making public the indignities she has suffered in private . . . when she is precluded from recovering damages for her perpetrators' behavior.

The Committee heard tragic testimony in this regard from Patricia Swanson of Ingleside, Illinois. Swanson worked for over a year as an assistant finance manager for a car dealer. Throughout that time, she was sexually harassed by her supervisor. Her account of a few of the incidents, and of their devastating effect on her, is set forth below:

> [M]y boss . . . would sneak up behind me and try to unhook my bra. This happened at least 2 to 3 times a week. Sometimes I had to scoot down in my chair to keep him from succeeding. Even then he would reach down the chair and keep trying. . . .
>
> On several occasions, [he] would run up behind me in the hallway and would run his hand under my skirt and grab me between the legs, on my thigh. One time I was carrying a cup of hot coffee when he did this, and spilled it down the front of me. He told me to take my clothes off right there and he would have them cleaned. I went into the ladies room to clean up in private, and he followed me. As I was wiping the coffee off my blouse, he tried to take the paper towel out of my hand and wipe off my chest himself. He didn't leave until I started to cry. . . .
>
> On several occasions, [he] called me in to his office . . . when other men were present. They were salesmen, customer friends of his, or wholesalers. When I entered he would point at me and say to the other men present, "Have your ever seen such big boobs; wouldn't you love to

> grab them?" I never knew who these men were. My husband was in the automobile business too, and they might have known him. I was humiliated, and worried that my husband might be as well.
>
> All this harassment had a strong effect on me. I dreaded seeing [him] in the morning; I knew he would say something to me every day. On a number of occasions, he would make me cry—I would always go into the washroom to do it, so that he wouldn't see me. I was always edgy, and I had trouble concentrating. I was always afraid of running into [him]. . . . I felt like I was a prisoner in my own office.
>
> It also affected me physically. Sometimes the harassment would give me migraines. After one particularly bad incident, my migraine was so bad that I almost passed out. . . .

In a lawsuit brought by Swanson, the district court found that she had proved that she had been sexually harassed by her employer, but concluded that she had been dismissed from her job for unrelated reasons. The district court recognized that it could not award her damages for the harassment or an injunction against further harassment; however, it awarded her nominal damages of one dollar, plus attorney's fees.

On appeal, the Seventh Circuit affirmed the finding of sexual harassment, but reversed the judgment for Swanson and the award of nominal damages and attorney's fees. *Swanson* v. *Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235 (7th Cir. 1989). While acknowledging that "this result may seem harsh since Swanson has proved sexual harassment in the workplace," the appellate court ruled that Swanson could recover no relief under Title VII, and that, as a result, her employer was entitled to judgment, even though it had violated Title VII. *Id.* at 1240. As Swanson testified before the Committee, that judgment also entitled her employer to require her to pay his court costs.

Swanson's case is far from an isolated one. All too frequently, Title VII leaves victims of employment discrimination without remedies of any kind for their injuries and allows employers who discriminate to avoid any meaningful liability. *See* National Women's Law Center, Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy (1990) (collecting cases). For example, in *Bohen* v. *City of East Chicago, Indiana,* 799 F.2d 1180 (7th Cir. 1986), Hortencia Bohen was the victim of vicious sexual harassment by her supervisor and co-workers. Throughout the time she worked there, Bohen was subjected to verbal abuse, unwanted touching, and at one point was told that she really needed to be raped in the bushes. The court found that "sexual harassment was the general, ongoing, and accepted practice" at the fire department where she worked as a dispatcher, *id.* at 1189; but the court was unable to award her any damages under Title VII.

The need for a damages remedy is also clearly present outside the context of harassment cases. To take but one example, Jeanne Harrington was a physical education teacher who was the victim of discriminatory working conditions. While male physical education teachers were given an office, private toilet, lockers and shower facilities, Harrington was given only a partitioned space within the girls' locker room for an office, and she was forced to use the students' toilet and shower facilities. The Court of Appeals for the Sixth Circuit ruled that although Harrington had been discriminated against, she could recover no damages for the discriminatory treatment. *Harrington* v. *Vandalia-Butler Board of Education,* 585 F.2d 192 (6th Cir. 1978), *cert. denied,* 441 U.S. 932 (1979).

The failure to provide compensatory and punitive damages in Title VII leaves the statute without a meaningful deterrent for intentional discrimination on the job. As Judge Clarence Thomas, former Chair of the U.S. Equal Employment Opportunity Commission, has stated:

> [T]he equitable remedies available under Title VII are not as compelling as the civil damages available under other federal statutes. While we can provide backpay and reinstatement to employees who have been wrongfully denied equal job opportunities, we cannot penalize those who discriminate. It is high time we consider strengthening the sanctions we can impose in order to increase our ability to fully protect the right to equal opportunity. . . . [I]t is a disgrace that the penalty for tampering with a mailbox is greater than the penalty for discriminating. Just telling a discriminator to do right—to hire a few minorities—to promote a few women—is not enough. "Discrimination and Its Effects," speech by Clarence Thomas before the New Coalition (August 17, 1983).

In his recent confirmation hearings, Judge Thomas repeated his support for permitting compensatory and punitive damages to be awarded under Title VII, stating that "there have to be disincentives available rather than merely equitable relief. . . . Title VII needed to be strengthened significantly." Hearing on the Nomination of Clarence Thomas, before the Senate Judiciary Committee (February 6, 1990).

Permitting the award of damages in intentional discrimination cases under Title VII will not interfere with the conciliation and adjudication of claims by the EEOC under that statute. Under current law, persons who bring race discrimination claims before the EEOC may have claims under both section 1981 and Title VII. There is absolutely no evidence that the availability of damages under section 1981 has interfered with conciliation by the EEOC of race discrimination claims. As former EEOC Chair Eleanor Holmes Norton stated in the Committee's hearings:

> [M]ost Title VII litigation is brought under both provisions, which means that almost necessarily the party has to take advantage in one way or another of Title VII, including conciliation provisions or whatever may be applicable. . . . I don't see how allowing damages where they are not now allowed would interfere with the prompt resolution of cases.

The Committee finds that there is a compelling need to amend Title VII to permit damages to be awarded in cases of intentional discrimination.

THE NEED TO CLARIFY THE LAW REGARDING AVAILABILITY OF ATTORNEY'S FEES IN TITLE VII CASES

The testimony and other evidence before the Committee also demonstrated the need to clarify Title VII's provisions concerning the availability of attorney's fees to prevailing parties, which has been severely limited by several recent Supreme Court decisions. Congress recognized nearly fifteen years ago that our "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain." S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976).

Unfortunately, there is considerable evidence that because of the difficulty in recovering attorney's fees, competent counsel are increasingly unwilling to represent persons with Title VII claims. As a regional attorney for the EEOC wrote in 1989:

> The single most significant development in equal employment law has been the erosion of the ground from under plaintiffs' counsel, particularly in the area of a prevailing plaintiff's recovery of attorney fees. The situation has deteriorated to such a degree that private counsel representing plaintiffs in equal employment cases have become an endangered species, in many places already extinct. Terry, "Eliminating the Plaintiff's Attorney in Equal Employment Litigation," 5 *The Labor Lawyer* 63 (1989).

Indeed, in November, 1989, one federal court specifically noted the "dearth of competent counsel willing to represent victims of discrimination" despite many "meritorious suits"; the net result, the court concluded, is that "the progress that has been made during the past four decades toward eradicating discrimination . . . will be halted, and the promise of equal treatment and opportunity for *all* will be but empty words." *Robinson* v. *Alabama State Department of Education,* 727 F. Supp. 1422, 1430–32 (M.D. Ala. 1989) (emphasis in original).

Several recent Supreme Court decisions have contributed significantly to the shortage of qualified counsel willing to represent victims of discrimination.

In *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), the Court held that absent express congressional authorization, the courts may not award expert witness fees as part of taxable costs under Rule 54(d) of the Federal Rules of Civil Procedure. All but one of the federal appellate courts have applied the *Crawford Fitting* rule to bar full recovery of expert witness fees under Title VII.[17] Because expert testimony is expensive and often of critical

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[17] *See, e.g., West Virginia University Hospitals, Inc.* v. *Casey,* 885 F.2d 11 (3d Cir. 1989), *cert. granted,* 110 S. Ct. 1294 (1990); *Denny* v. *Westfield State College,* 880 F.2d 1465 (1st Cir. 1989); *Gilbert* v. *City of Little Rock,* 867 F.2d 1062 (8th Cir.) *(en banc), cert. denied,* 110 S. Ct. 57 (1989);

Continued

importance in Title VII litigation, it is necessary to clarify that the full amount of reasonable expert witness fees may be recovered by prevailing parties in Title VII cases. At least 28 federal statutes already provide such express authorization.[18]

In *Mark* v. *Chesny,* 473 U.S. 1 (1985), the Court was called upon to determine the applicability in a civil rights case of Rule 68 of the Federal Rules of Civil Procedure. That rule authorizes a defendant to make a written offer of judgment to a plaintiff at any time up to ten days before trial, and provides that "[i]f the judgment finally obtained by the [plaintiff] is not more favorable than the offer, the [plaintiff] must pay the costs incurred after the making of the offer." The Court ruled that because the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. section 1988, permits recovery of attorney's fees "as part of the costs," rule 68 bars prevailing civil rights claimants who reject an offer of judgment that is more favorable than what is eventually recovered at trial from recovering attorney's fees for services performed after the offer is rejected.

Like section 1988, the attorney's fees provision in Title VII, section 706(k), also permits the award of such fees "as part of the costs." The *Marek* rule places undue pressure on Title VII claimants to respond favorably to early settlement offers, before they have had an opportunity to engage in adequate discovery to inform them about the extent of the respondent's illegal activity and ultimate liability. And because some of the more than 100 federal attorney's fees statutes (such as the Fair Housing Act) [19] authorize the award of attorney's fees *and* costs, while others authorize awarding attorney's fees *as part of* the costs, the Court's decision has had the effect of arbitrarily placing Title VII litigants and others at a profound disadvantage based on what is clearly a mere accident in legislative drafting.

In *Evans* v. *Jeff D.,* 475 U.S. 717 (1986), the Court ruled that nothing in the civil rights laws barred defense counsel from conditioning a proposed settlement upon a waiver of all of the attorney's fees to which the plaintiff's counsel would otherwise be entitled. The effect of the *Evans* rule is to permit defendants in civil rights cases to put plaintiffs in the position of having to choose between receiving relief that they want without further litigation or continuing the litigation for the sole purpose of assuring that their counsel receives compensation.

Because the circumstances frequently compel or coerce a plaintiff to waive his or her attorney's fee claim, the willingness of lawyers to accept civil rights cases has been diminished. As a result, the congressionally mandated policy of assuring that victims of discrimination have adequate access to counsel to vindicate their rights will be badly undercut.

Sevigny v. *Dicksey,* 846 F.2d 953 (4th Cir. 1988); *Glenn* v. *General Motors Corp.,* 841 F.2d 1567 (11th Cir.), *cert. denied,* 109 S. Ct. 378 (1988); *LeRoy* v. *City of Houston,* 831 F.2d 576 (5th Cir. 1987), *cert. denied,* 108 S. Ct. 1735 (1988); *but see Friedrich* v. *City of Chicago,* 888 F.2d 511 (7th Cir. 1989).

[18] *Woodworkers* v. *Champion International,* 790 F.2d 1174, 1179 n.7 (5th Cir. 1986), *aff'd sub nom. Crawford Fitting Co.* v. *J.T. Gibbons, Inc.,* 482 U.S. 437 (1987).

[19] *E.g.,* Motor Vehicle Act, 15 U.S.C. sec. 1918(a); Fair Labor Standards Act, 29 U.S.C. sec. 216(b); Alaska National Interest Lands Conservation Act, 43 U.S.C. sec. 1631(c). *See also Marek* v. *Chesny,* 473 U.S. 1, 43-51 (Appendix to opinion of Brennan, J., dissenting) (listing statutes).

And in *Independent Federation of Flight Attendants* v. *Zipes*, 109 S. Ct. 2732 (1989), the Court ruled that plaintiffs who had prevailed in a Title VII action could not recover from an intervenor the attorney's fees the plaintiffs had incurred in successfully defending their Title VII judgment against the intervenor's claim, unless "the intervenor['s] action was frivolous, unreasonable or without foundation." 109 S. Ct. at 2736. At the same time, the Court indicated in dictum that prevailing plaintiffs may also not be able to recover those fees from the original defendants. *Id.* at 2737.

The effect of such a rule would be to prevent prevailing plaintiffs in employment discrimination cases from being able to secure counsel to defend the relief those plaintiffs have obtained under Title VII. Such a result would severely undercut Congress's objective of assuring that victims of discrimination have adequate means to vindicate their civil rights.

In sum, as E. Richard Larson, Vice President for Legal Programs of the Mexican American Legal Defense and Education Fund, testified, the other provisions of the Civil Rights Act of 1990 and Title VII itself may well become "no more than *hollow pronouncements* meaning little or nothing to the victims of employment discrimination unless the impecunious victims can find lawyers to vindicate their rights." The Committee finds that legislation is needed to overrule the attorney's fees decisions described above.

PROVIDING FOR INTEREST IN ACTIONS AGAINST THE FEDERAL GOVERNMENT

The Supreme Court has recognized that, because of the length and complexity of civil rights cases, interest or other compensation for delay in payment of attorney's fees is appropriate in such cases. *See, e.g., Missouri* v. *Jenkins,* 109 S. Ct. 2463, 2469 (1989):

> Clearly, compensation received several years after the services were rendered—as it frequently is in complex civil rights litigation—is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings. We agree, therefore, that an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of the statute. (Footnote omitted).

But in *Library of Congress* v. *Shaw,* 478 U.S. 310 (1986), the Supreme Court held that the doctrine of sovereign immunity barred an award of interest or other compensation for delay in payment in a Title VII action against the federal government. Because Title VII authorizes the award of interest or other compensation for delay in payment in actions against all other parties, private and public, including state and local governments,[20] the *Shaw* decision leaves victims of employment discrimination by the federal government in a poorer position than all other victims of employment discrimination.

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[20] *See, e.g., Johnson* v. *University College of University of Alabama,* 706 F.2d 1205 (11th Cir. 1983), *cert. denied,* 464 U.S. 994 (1983); *Louisville Black Police Officers Org., Inc.,* v. *Louisville,* 700 F.2d 268 (6th Cir. 1983); *Chrapliwy* v. *Uniroyal, Inc.,* 670 F.2d 760 (7th Cir. 1982).

Congress frequently waives the sovereign immunity of the federal government for claims for prejudgment interest.[21] There is a compelling need to do so in Title VII so that victims of employment discrimination by the federal government may obtain full and adequate relief.

NEED TO CODIFY RULES OF CONSTRUCTION

For more than a century, it has been a widely accepted principle of American law that remedial statutes, such as civil rights laws, are to be broadly construed. Congress relied on that rule when it adopted one of the first of those laws, the Civil Rights Act of 1871. Representative Shellabarger, the floor leader for the bill, stated:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All . . . such statutes are liberally and beneficently construed. It would be most strange, and in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by [the] Supreme Court of the United States, . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes . . . as one meant to protect and defend and give remedies for their wrongs to all the people. Cong. Globe, 42nd Cong., 1st Sess., App. 68 (1871).

This rule has been repeatedly applied by the Supreme Court in construing civil rights statutes. *See, e.g., United States* v. *Price,* 383 U.S. 787, 801 (1966); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 437 (1968); *Griffin* v. *Breckenridge,* 403 U.S. 88, 97 (1971).

In previous instances where the Court has deviated from this principle and given unduly narrow constructions to civil rights statutes, Congress has been required to pass legislation to overrule these interpretations. *See, e.g.,* Pregnancy Discrimination Act of 1978, Pub. L. 95-555 (overruling *General Electric* v. *Gilbert,* 429 U.S. 125 (1976)); Voting Rights Act Amendments of 1982, Pub. L. 97-205 (overruling *City of Mobile* v. *Bolden,* 446 U.S. 55 (1980)); Handicapped Children's Protection Act of 1985, Pub. L. 99-372 (overruling *Smith* v. *Robinson,* 468 U.S. 992 (1984)); Civil Rights Restoration Act of 1988, Pub. L. 100-259 (overruling *Grove City College* v. *Bell,* 465 U.S. 555 (1984)). When Congress has done so, the legislative history is replete with references to Congress's intention that civil rights laws are to be broadly construed consistent with their remedial purpose.[22]

Despite these repeated expressions of Congress's view, the recent civil rights decisions addressed in this legislation strongly suggest that the Supreme Court appears to have completely ceased applying this rule of construction in civil rights cases. The Committee finds that there is a compelling need to codify this rule of construction in order to assure that the Supreme Court will properly interpret the federal civil rights laws.

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[21] Most recently, in 1987 Congress amended the Back Pay Act to provide for awards of prejudgment interest to Federal employees who have been improperly demoted, disciplined or compensated. Pub. L. 100-202, sec. 623, 101 Stat. 1329-1428, 5 U.S.C. sec. 5596(b)(2). *See also* 28 U.S.C. sec. 2411 (income tax overpayments); 26 U.S.C. sec. 7426 (wrongful income tax levies).

[22] *See, e.g.,* S. Rep. No. 100-64, p. 5 (1987) (overturning *Grove City College* v. *Bell,* 465 U.S. 555 (1984)); H. Rep. No. 95-948, pp. 3-7 (1978) (overturning *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976)).

V. SUMMARY OF COMMITTEE ACTION

The Committee met to consider S. 2104 on April 4, 1990. The Committee accepted two amendments: an amendment in the nature of a substitute proposed by Senator Kennedy and Senator Jeffords, which made several technical changes, and an amendment proposed by Senator Hatch, as modified by a second-degree amendment by Senator Kennedy. The Committee defeated two other amendments by roll call votes. The bill was reported favorably out of Committee by a voice vote.

The Hatch amendment as modified by the Kennedy second-degree amendment provides that nothing in Title VII bars an employer from adopting policies against current, knowing illegal use or possession of drugs by employees, so long as such policies are not adopted or applied with an intent to discriminate on the basis of race, color, religion, sex or national origin. The amendment was adopted unanimously.

By a vote of 12-4, the Committee defeated an amendment proposed by Senator Hatch that would have retained the legal standards of *Wards Cove* v. *Atonio* where employers sought to justify discriminatory practices on health or safety grounds.

The vote on the Hatch amendment concerning health and safety issues was as follows:

AYES—4	NAYS—12
Hatch	Pell
Coats	Metzenbaum
Thurmond	Matsunaga
Cochran	Dodd
	Simon
	Harkin
	Adams
	Mikulski
	Kassebaum
	Jeffords
	Durenberger
	Kennedy

By a vote of 11-5, the Committee defeated an amendment proposed by Senator Hatch that would have created an exception to the preclusion rule set forth in section 6 of the bill.

The vote on the Hatch amendment to expand challenges to consent decrees was as follows:

AYES—5	NAYS—11
Hatch	Pell
Kassebaum	Metzenbaum
Coats	Matsunaga
Thurmond	Dodd
Cochran	Simon
	Harkin

Adams
Mikulski
Jeffords
Durenberger
Kennedy

By a vote of 11-5, the Committee voted to adopt the Kennedy-Jeffords substitute.

The vote on the Kennedy-Jeffords substitute was as follows:

AYES—11	NAYS—5
Pell	Hatch
Metzenbaum	Kassebaum
Matsunaga	Coats
Dodd	Thurmond
Simon	Cochran
Harkin	
Adams	
Mikulski	
Jeffords	
Durenberger	
Kennedy	

By voice vote, the Committee voted to report S. 2104, as amended, favorably to the full Senate.

VI. Explanation of the Legislation

FINDINGS AND PURPOSES

Section 2(a) of the legislation sets forth Congress's findings that the Supreme Court's recent employment discrimination decisions have cut back dramatically on the scope and effectiveness of civil rights protections, and that, as a result, existing protections and remedies are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

Section 2(b) of the legislation reflects that the Act's purposes are both to respond to the Court's recent decisions by restoring the civil rights protections that were so dramatically limited, and to strengthen existing protections and remedies to provide more effective deterrence and adequate remedies for victims of discrimination.

RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES

Sections 3 and 4 of the legislation add new provisions to Title VII to overrule several aspects of the *Wards Cove* decision and restore the prior *Griggs* rule in disparate impact cases.

Section 3 amends section 701 to add definitions for certain terms used in the bill. Section 4 adds a new section 703(k) to restore the *Griggs* rule.[23]

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[23] Section 703(k) sets forth the rules governing all disparate impact cases brought under Title VII, including those brought against the Federal Government under section 717.

Disparate impact

Section 703(k)(1) sets forth the rules of proof for establishing an unlawful employment practice based on disparate impact under Title VII. The Committee intends the terms "disparate impact" to retain the same meaning it has been given by the courts in the line of cases extending from *Griggs* through *Wards Cove*. The impact of the practice on qualified persons in the labor market is of critical importance. *See Wards Cove*, 109 S. Ct. at 2121:

> It is such a comparison—between the . . . composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms the proper basis for the initial inquiry in a disparate impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics—such as measures indicating the . . . composition of "otherwise-qualified applicants" for at-issue jobs—are equally probative for this purpose. (Citations and footnote omitted).

The concept of disparate impact, as it has been developed by the courts, would thus remain unchanged by the legislation.

Burden of proof

For 18 years following the *Griggs* decision, the employer in a disparate impact case indisputably bore the burden of demonstrating that a practice shown by the complaining party to have a disparate impact was required by business necessity. In *Wards Cove*, the Supreme Court overruled this aspect of *Griggs*, holding that while the employer has the burden of producing evidence justifying an employment practice shown to have disparate impact, "the burden of persuasion . . . remains with the disparate-impact plaintiff." 109 S. Ct. at 2126.

Proposed section 703(k)(1) would restore to the employer the burden of proof of justifying practices shown to have disparate impact. Proposed subsection (A) provides that an unlawful employment practice based on disparate impact is established when a complaining party [24] demonstrates [25] that an employment practice results in a disparate impact, and the respondent [26] fails to demonstrate that such practice is required by business necessity.

Experience in hundreds of cases between 1971 and 1989 demonstrated that this was a fair and workable rule. No witness appearing before the Committee suggested that any problems had arisen during this period because of this longstanding allocation of the burden of proof.

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[24] Under proposed subsection 701(l), a "complaining party" is defined to mean the EEOC, the Attorney General, or a person who may bring an action or proceeding under Title VII.

[25] The definition of "demonstrates" added by proposed subsection 701(m) makes it clear that where the statute would require a party to demonstrate a particular fact, that party bears both the burden of production and the burden of persuasion as to that fact. Where a party has the burden of persuasion as to a particular fact, that party cannot prevail unless the evidence establishes that it is more likely than not that the fact has been established. *See* Cleary, *McCormick on Evidence* sec. 339 (1984); *Abilene Sheet Metal, Inc.* v. *NLRB*, 619 F.2d 332, 339 (5th Cir. 1980).

[26] Proposed subsection 701(p) defines "respondent" to mean an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof). It is intended to include all persons or entities which may be held liable under Title VII.

The pre-*Wards Cove* allocation of the burden of proof is fully consistent with general legal principles. Once a plaintiff establishes that an employment practice has a disparate impact, he or she has proven that the practice has a discriminatory effect. Title VII does not prohibit all practices with a discriminatory effect, however, only those that are not justified by business necessity. "Such a justification," as Justice Stevens observed in his dissenting opinion in *Wards Cove*, "is a classic example of an affirmative defense" regarding which a defendant always bears the burden of proof. 109 S. Ct. at 2131. *See* Fed. R. Civ. P. 8(c).[27]

The practical reasons for placing the burden of proving business necessity on the employer are obvious: the employer has control over the employment process; it selects the practices used to make an employment decision; and it is more likely to be aware of the relative costs and benefits of the practices used and of alternative practices that were not used to make the decision. It confounds logic to place on a job applicant or employee the burden of demonstrating the absence of business necessity for a discriminatory employment practice when the employer, which selected that practice in the first place, has ready access to all of the relevant information.

Some have argued that placing the burden of proof on employers to establish business necessity is inconsistent with the allocation of burden of proof in disparate treatment cases, as set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). This argument is wrong, for three reasons.

First, the burden of proof in establishing a prima facie disparate impact case is considerably more difficult than the burden of proof in establishing a prima facie case of individual disparate treatment. A prima facie disparate treatment case may be established, for example, by demonstrating that the complaining party belongs to a racial minority or is a woman; that he or she applied and was qualified for a job for which the employer was seeking applicants; that, despite his or her qualifications, he or she was rejected; and that after the rejection, the position remained open and the employer continued to seek applications from persons of the complaining party's qualifications. *McDonnell Douglas*, 411 U.S. at 802. By contrast, to establish a prima facie disparate impact case, a complaining party must demonstarate that an employment practice or group of employment practices resulted in a disparate impact on qualified minorities or women. As former Transportation Secretary William T. Coleman, Jr. testified, it is not sufficient merely to show

> that an employer had a smaller proportion of minority employees than existed in the population as a whole . . . . [P]roof of a prima facie case requires two additional types of evidence. First, the plaintiff must ordinarily show what

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[27] It is not unusual for a federal statute to stipulate that once a prima facie case is established, the burden of proof is on the party seeking to offer a justification. *See, e.g.*, 15 U.S.C. sec. 13(b) (once case of discrimination shown under Robinson-Patman Act, burden is on person charged with violation to show justification).

> impact the requirement actually had on individuals who applied for the position at issue or took the disputed test. Plaintiffs may look to some other broader pool only if the application process itself is tainted by discrimination, or if there is no application process at all. Second, the plaintiff must show what impact the disputed practice had on *qualified* actual or potential applicants. Of course in any disparate impact case the plaintiff, by definition, is challenging the legitimacy of one or more qualifications insisted upon by the employer, but where there are qualification requirements of undisputed legitimacy, a plaintiff must ordinarily take them into account in establishing a prima facie case. (footnotes omitted).

Second, in a disparate treatment case, once the complaining party demonstrates discriminatory intent, the case is over—the complaining party prevails.[28] By contrast, in a disparate impact case, once a complaining party has demonstrated that a challenged practice or group of practices operates to exclude qualified minorities or women, the employer may escape liability altogether by showing that the practice or group of practices is required by business necessity.

And third, it is not true that the burden of proof remains on the plaintiff in all disparate treatment cases. An employer asserting that sex, national origin or religion is a bona fide occupational qualification also bears the burden of proof as to that defense.[29] And section 701(j) of Title VII, 42 U.S.C. sec. 2000e(j), declares that an action which burdens religious belief or practice is unlawful "unless *an employer demonstrates* that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." (emphasis added). *See also Price Waterhouse* v. *Hopkins,* 109 S. Ct. 1775 (1990) (once employee demonstrates that discrimination was a motivating factor in an employment decision, burden is on the employer to prove that same decision would have been made for nondiscriminatory reasons).

Business necessity

Where a complaining party demonstrates that an employment practice or practices or group of employment practices have a disparate impact, proposed section 703(k)(1) requires that the respondent demonstrate that such practice or practices or group of practices "is required by business necessity." Section 3 of the bill adds a new subsection 701(o) that defines "required by business necessity" to mean "essential to effective job performance." These provisions are intended to restore the established legal rules that prevailed under *Griggs* prior to *Wards Cove.*

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[28] In those instances where the employer has articulated a legitimate, nondiscriminatory reason for the employment decision, the complaining party must have demonstrated that the purported reasons were in fact a pretext for a discriminatory decision.

[29] *Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079, 1085-86 (8th Cir.), *cert. denied,* 446 U.S. 966 (1980); *Weeks* v. *Southern Bell Tel. & Tel.,* 408 F.2d 228, 235 (5th Cir. 1969); *see Dothard* v. *Rawlinson,* 433 U.S. 321, 333 (1977).

In the years since 1971, the *Griggs* rule was applied in hundreds of cases involving a wide variety of circumstances. These decisions rested on two fundamental doctrines that are central to the business necessity defense. First, presumptions or preconceptions about the usefulness of an employment practice are insufficient to establish business necessity; evidence that actually demonstrates the relationship between the disputed practice and effective job performance is required.

Second, the employer must prove that the practice or practices are essential to effective job performance. This means both that the relationship between the practice and effective job performance must be a close one, and that use of the disputed practice produces workers who effectively perform important aspects of the job. In short, Title VII permits an employer to use practices that have a disparate impact on minorities or women, if they are required by business necessity.

The prevailing pre-*Wards Cove* law regarding the meaning of and method of proving business necessity is exemplified by the Uniform Guidelines on Employee Selection Procedures.[30] The Uniform Guidelines were promulgated by the Department of Justice, the Department of Labor, the EEOC, and the then Civil Service Commission. They have remained in effect for a dozen years under three Presidents and five Attorneys General. The Uniform Guidelines were—

> built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.[31]

The Uniform Guidelines represent the interpretation of *Griggs* applied by the federal government in enforcing Title VII. Its provisions embody the legal principles that were accepted and applied prior to *Wards Cove,* and which the Committee intends sections 3 and 4 to restore.

When Title VII was first enacted, Congress expressly rejected a proposed amendment offered by Senator Tower that would have insulated from legal challenge all "professionally developed ability test[s]." [32] The Tower amendment was defeated precisely because it would have exempted employers from an obligation to demonstrate that a disputed test *in fact* led to significantly enhanced job performance.

The requirement that there be an actual demonstration of business necessity derives from *Griggs* as well. The employer in *Griggs* sought to justify its test and high school degree requirement by offering the testimony of a company vice president that "the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force." 401 U.S.

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[30] The Uniform Guidelines are codified in 28 C.F.R. sec. 50.14 (1989) (Department of Justice).

[31] Uniform Guidelines, Section 1(c).

[32] 110 Cong. Rec. 11251 (1964). Under the terms of the rejected amendment it would have been sufficient that the test was "*designed* to determine or predict whether [an] individual is suitable or trainable with respect to his employment," regardless of whether the test *in fact* was an accurate predictor of job performance.

at 431. The Supreme Court dismissed that testimony as falling far short of a "meaningful study of [the] relationship [of the requirements] to job performance ability." *Id.* at 431.[33]

The test and high school degree requirements in *Griggs* were condemned by the Supreme Court because neither was "shown to bear a *demonstrable* relationship to successful performance of the jobs for which it was used." [34] Similarly, in *Albemarle,* the official who had selected one of the disputed tests explained that he had done so because of a personal belief that it would benefit plant operations; and the company also offered testimony that two other tests had been "locally validated," although plant officials could recall no details of how that had occurred, and the employer introduced no records documenting the asserted validation process.[35] Again the Supreme Court dismissed out of hand that unsubstantiated justification.

The pre-*Wards Cove* law also made it clear that the evidence offered to show the business necessity of an employment practice must address directly the necessity of the practice for the particular job for which it is utilized. The Supreme Court stressed in *Griggs,* "What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." 401 U.S. at 436. Similarly, in *Albemarle,* the Supreme Court stated that the "message" of the *Griggs* case was

> that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant *to the job or jobs for which candidates are being evaluated.*" *Id.* at 431 (quoting the EEOC's 1970 Guidelines, 29 CFR sec. 1607.4(c)) (emphasis added).

The *Albemarle* Court thus insisted that, save in extraordinary circumstances, evidence that a given test was required to measure effective job performance for a specific position would not ordinarily be sufficient to prove that the same test would be valid for a different job. 422 U.S. at 431-32. Similarly, an employer may not establish business necessity for the use of a requirement for a lower level position merely by adducing evidence that the requirement significantly enhances overall job performance for a different, higher position.

> The fact that the best of [the] employees working near the top of a line of progression score well on a test does not necessarily mean that that test, or some particular cutoff score on the test, is a permissible measure of the minimal qualifications of new workers entering lower level jobs. In

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[33] This requirement of an actual demonstration of business necessity has been codified in the Uniform Guidelines on Employee Selection Procedures. *See, e.g.,* section 9(A), which rejects certain types of evidence as inherently inadequate to support a claim of business necessity:

> Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of it's validity be accepted in lieu of evidence of validity. 28 C.F.R. sec. 50.14 (1989).

[34] 401 U.S. at 431 (emphasis added); *see also id.* at 436. (Congress has forbidden selection devices with an adverse impact "unless they are *demonstrably* a reasonable measure of job performance") (emphasis added).

[35] 422 U.S. at 428 & n.23.

> drawing any such conclusion, detailed consideration must be given to the normal speed of promotion, to the efficacy of on-the-job training in the scheme of promotion, and to the possible use of testing as a promotion device, rather than as a screen for entry into low level jobs. *Id.* at 434.

A demonstration of business necessity must deal not only with the subject matter of the test or job requirement, but also with the manner in which it is used. The passage from *Albemarle* quoted in the previous paragraph makes clear, for example, that proof of business necessity must address the particular cutoff score used on a test. It is not sufficient to justify a strength requirement for firefighters that firefighting activities require physical strength. The critical issue in such a case is what degree of strength is actually required for effective job performance. Similarly, if using relative performance on a particular test has a disparate impact, an employer who wants to use relative performance on the test in making employment decisions may do so if the employer demonstrates that use of the test in this manner is required by business necessity.

Albemarle also held that " 'differential validation' as to racial groups" should be done where "feasible." 422 U.S. at 435. Such a requirement comes into play, for example, where qualified black workers fail a test at a higher rate than whites who are equally good workers. Such a test is not required by business necessity.

The underlying practical question when business necessity is at issue is thus whether use of the practice in dispute is significantly more likely to produce an effective work force than other, less discriminatory, alternatives—*e.g.*, are the employees selected by means of the test or other job requirement significantly more likely to be effective workers than the employees who would have been selected if that test or requirement were not used, or were used in a less discriminatory manner?

Actual job performance may encompass a variety of considerations, such as productivity and work quality. To demonstrate that a practice is required for effective job performance, it is not sufficient that the practice be related to some insignificant aspect of job performance; the aspect of job performance measured by the practice must be important when assessed in the context of the employees' total duties. This requirement is consistent with the insistence in *Albemarle* that a practice be predictive of "*important* elements of work behavior,"[36] and with the emphasis throughout the Uniform Guidelines on "important" and "critical" aspects of actual job performance.[37]

Section 4 restores the *Griggs* requirement that an employer demonstrate the existence of "business necessity" to justify an employment practice with a disparate impact. In order to assure that the statute achieves the intended purpose of restoring pre-*Wards Cove* law, the legislation must include a definition of business necessity to obviate the possibility that the term will be construed in a manner inconsistent with *Griggs* and its progeny. Because essential is a synonym for necessary, business necessity is defined as "essential to effective job performance."

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[36] 422 U.S. at 431 (emphasis added).

[37] *See* Uniform Guidelines, sections 5(B), 14(B)(2), 14(B)(3), 14(C)(2), 14(D)(2), 15(B)(3), 15(C)(3), 15(D)(3).

The purpose of this definition is not to formulate a standard of business necessity different or more stringent than what prevailed prior to *Wards Cove*.[38] It is to assure that "business necessity" will not be construed to adopt the standard set by the *Wards Cove* majority—merely to mean that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." 109 S. Ct. at 2125-26.

Multiple practices

Under proposed section 703(k)(1), a complaining party may bring a disparate impact case either to challenge a single employment practice under section 703(k)(1)(A), or a group of employment practices under section 703(k)(1)(B). Proposed section 701(n) defines a group of employment practices to mean a combination of employment practices that produce one or more employment decisions. Where the complaining party chooses to challenge a group of practices that combine to produce one or more employment decisions, he or she must show that those practices, taken together, cause a disparate impact.

Where such a showing is made under section 703(k)(1)(B), the employer need not show that all the practices involved are required by business necessity. If the employer can demonstrate that one or more practices within the group of employment practices at issue did not contribute to the disparate impact, it need not make a showing of business necessity as to those practices.

In the most common kind of disparate impact case, the complaining party is rejected for a job or promotion because of the effect of one or more particular practices; and the complaining party brings suit alleging that those particular practices have a disparate impact. In *Connecticut* v. *Teal*, for example, although the employer made promotions on the basis of a test score, work performance, recommendations and seniority, the plaintiff was denied a promotion expressly and solely because of her test scores. 457 U.S. at 444. In such a situation, the plaintiff would challenge only the test requirement, since he or she was adversely affected only by that practice.

Proposed subsection 703(k)(1)(B) typically addresses situations in which an employer uses a group of practices (such as a combination of interviews, tests, and evaluations) to make an employment decision, those practices together have a disparate impact, and it is not readily discernible to the complaining party which practice or practices caused the disparate impact. Under the subsection, the complaining party may establish a prima facie case of an unlawful employment practice by demonstrating that the group of employment practices has a disparate impact. The subsection would then place on the employer the burden of demonstrating which particular practice or practices had a disparate impact, and that those particular practices are required by business necessity.

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[38] Indeed, in a number of cases applying the *Griggs* business necessity test, lower courts have reviewed particular employment practices which had a disparate impact on minorities or women, and concluded that the practices were justified as *necessary* to effective job performance. *See, e.g., Hamer* v. *City of Atlanta*, 872 F.2d 1521, 1533-34 (11th Cir. 1989) (promotional examination); *Hawkins* v. *Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir. 1983) (educational requirement); *McCosh* v. *City of Grand Forks*, 628 F.2d 1058, 1062 (8th Cir. 1980) (promotion policy).

Frequently, the employer's owns records will reveal which practice or practices were responsible for the disparate impact; and it will be a relatively simple matter for the employer to focus the dispute by identifying the responsible practices. Under *Wards Cove,* however, an employer can defeat a disparate impact claim in this situation simply by failing to maintain or produce the relevant records or other information. This would occur, for example, if an employer required applicants to be at least 5′7″ tall and weigh at least 160 pounds—and as a result all otherwise qualified female applicants were excluded—but kept no records disclosing whether women had been rejected because of their height or their weight or both. Under *Wards Cove,* such an employer would win such a lawsuit as a matter of law, because there would be no information from which a complaining party could prove that either specific practice had a disparate impact.

Under proposed subsection 703(k)(1)(B), the employer in such a case would be obligated to demonstrate that business necessity required both the height and weight rules; provided, however, that the employer need not demonstrate the business necessity for a practice that the employer demonstrates does not contribute to the disparate impact. Allocating the burden in this fashion is entirely appropriate, because the employer's failure to maintain adequate records was responsible for the inability to determine which practice resulted in the disparate impact.

Neither discovery procedures nor the record-keeping requirements of the Uniform Guidelines are sufficient to avoid the problem created by this aspect of the *Wards Cove* decision. A determined lawyer can at times substantially thwart, or make prohibitively expensive, entirely legitimate discovery. The recordkeeping provisions in the Guidelines are not as complete or efficacious as the *Wards Cove* opinion suggests. Indeed, in *Wards Cove* itself, the Guidelines did not require the employer to keep the records needed to identify the cause of the alleged disparate impact.

Scope of the provision

Under Title VII, a disparate impact claim can be brought when a facially neutral employment practice or group of employment practices adopted without discriminatory intent is demonstrated to have a disparate impact based on race, color, sex, religion, or national origin. Such a practice or group of practices violates Title VII, unless the employer demonstrates that the practice or group of practices meets the requirement of business necessity. Thus, practices—such as strength standards, tests, education requirements, leave or other personnel policies, or other subjective or objective evaluation procedures or other practices—that have a disparate impact on racial minorities or women may be invalidated where they are not demonstrated to be essential to effective job performance.

Proposed subsection 703(k)(2) reaffirms that a demonstration that an employment practice is required by business necessity may be used as a defense only against a disparate impact claim. The purpose of this subsection is to make clear that business necessity is never a defense to cases of facial discrimination or disparate treatment on the basis of race, color, gender, national origin or religion in violation of 42 U.S.C. sections 2000e(k) and 2000e–2 *et seq.* Instead, Congress set out the narrower bona fide occupational qualification ("BFOQ") defense, 42 U.S.C. section 2000e–2(e)(1), as a defense to facial gender, national origin and religious discrimination.[39] *See Price Waterhouse* v. *Hopkins,* 109 S. Ct. at 1786.

The legislation will not cause employers to adopt quotas

The foregoing discussion demonstrates that the Committee intends sections 3 and 4 of the bill merely to restore the law as it existed for 18 years under *Griggs*. In his testimony before the Committee, former Solicitor General Charles Fried stated that under *Griggs*, there was no general move toward quotas, and the Committee specifically finds no evidence that the *Griggs* rule coerced or compelled any employer to adopt hiring or promotion quotas.

Thus, sections 3 and 4 will not compel or coerce employers to adopt quotas in hiring or promotion. The Act does not permit across-the-board challenges to an employer's hiring or promotion processes whenever those processes result in any statistical disparity between the percentage of minorities or women who are hired or promoted and those in the population at large. To make out a prima facie cause under subsection 703(k)(1), a complaining party will have to show that an employment practice or group of employment practices has a disparate impact on qualified women or minorities. The term "disparate impact" is a term of art defined in decisions through and including *Wards Cove*; the bill does not change the requirements for proving disparate impact as used in these decisions. As former Secretary William T. Coleman, Jr. testified:

> *Wards Cove* clearly indicates that satisfying these requirements will often be difficult. Practical experience demonstrates that plaintiffs frequently have considerable difficulty establishing a prima facie case. There are in fact several hundred disparate impact cases which civil rights plaintiffs lost because they were unable to meet the stringent requirements needed to establish a prima facie case.

The mere showing that there is a statisical imbalance between the number of minorities or women hired or promoted and their numbers in the general population will not suffice. The complaining party must demonstrate that an employment practice or group of employment practices results in a disparate impact.

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[39] The BFOQ defense has, from its inception, been recognized as extremely stringent. As Justice Marshall's concurring opinion in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971), aptly observes, in the context of sex discrimination, the BFOQ exception is "applicable only to job situations that require specific physical characteristics necessarily possessed by only one sex." *Id.* at 545–46. Justice Marshall cited with approval the example in the Equal Employment Opportunity Commission regulations on BFOQ, 29 C.F.R. section 1604.2(a)(2), that it is permissible to employ actors and actresses for certain roles based on their gender. *Id.* at 546.

PROHIBITING ALL IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES

Section 5 of the legislation amends Title VII to overrule one aspect of the Supreme Court's decision in *Price Waterhouse* v. *Hopkins,* 109 S. Ct. 1775 (1989). There, a plurality opinion for the Court concluded that "when a plaintiff . . . proves that her gender played a motivating part in an employment decision, *the defendant may avoid a finding of liability* . . . by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Id.* at 1975 (emphasis added).

Section 5 of the legislation would add a new section 703(1) to provide that an unlawful employment practice is established when a complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for an employment practice, even though such practice was also motivated by other factors. In this respect, the bill follows the position taken by the Department of Justice under President Reagan, which argued in *Price Waterhouse* that proof that an employer would also have made the same decision for a nondiscriminatory reason did not erase the violation, but merely limited the appropriate remedy.[40]

While the existence of an invidious purpose is central to a disparate treatment claim, the provision would not make mere discriminatory thoughts actionable. To establish liability under proposed section 703(1), the complaining party must demonstrate that discrimination was a motivating factor in the employment decision, *i.e.*, that it actually contributed to the employer's decision to take action against the complaining party. Section 5 thus condemns, not discriminatory thoughts, but actions taken at least in part for discriminatory reasons.

Section 5 also amends section 706(g) to make it clear that where a complaining party establishes an unlawful employment practice under proposed section 703(1), a court may not order the admission or reinstatement of the individual as a member of a union, or the hiring, reinstatement or promotion of the individual as an employee or the payment to him or her of backpay, where the respondent establishes that it would have taken the same action in the absence of any discrimination. Thus, in a Title VII case under section 703(1), it would still be of importance for the purpose of determining the appropriate remedies whether an employer could prove it would have taken the same action even if no discrimination had been present.

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[40] *See* Brief for the United States as Amicus Curiae at 23-24, *Price Waterhouse* v. *Hopkins,* 109 S.Ct 1775 (1989) (No. 87-1167):

> [I]t is proper to place the burden on the defendant to prove that a given employment decision would have been the same in a discrimination-free environment. If the defendant makes such a showing, the plaintiff is made whole by an award of attorney's fees and an injunction against future discrimination. In effect, the defendant is ordered to cease discriminatory activity, which enhances the plaintiff's employment opportunities in the future. But the defendant need not hire, reinstate, promote or provide backpay to the plaintiff. . . . Title VII . . . should be construed to allow the defendant in a disparate treatment case to prove that, because the adverse employment decision would have been made in any event for legitimate, nondiscriminatory reasons, the plaintiff will be made whole by an award of attorney's fees and an injunction against future discrimination. (citations omitted).

Thus, where two independent motives, one discriminatory and one nondiscriminatory, were present, and the nondiscriminatory motive was sufficient to produce the adverse employment decision, the existence of the nondiscriminatory purpose would preclude a dismissed employee from obtaining court-ordered reinstatement, and would bar an unsuccessful applicant from obtaining an order requiring him or her to be hired. But, even if such an alternative purpose were present, the fact that discimination was a motivating factor for the employment decision would still violate Title VII, and a court could award whatever other relief would be appropriate, including injunctive relief, declaratory relief, compensatory or punitive damages in appropriate cases, and attorney's fees.

FACILITATING PROMPT AND ORDERLY RESOLUTION OF EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS

In *Martin* v. *Wilks,* 109 S. Ct. 2180 (1989), the Supreme Court held that nothing in Title VII or the Federal Rules of Civil Procedure barred persons who had failed to intervene in an employment discrimination suit in which a court decree was entered from bringing a later lawsuit to challenge hiring and promotion decisions made pursuant to that decree. In so doing, however, the Court recognized that Congress has the authority to adopt a "special remedial scheme" to foreclose successive litigation by nonlitigants, as has been done in the bankruptcy and probate contexts, "if the scheme is otherwise consistent with due process." *Id.* at 2184 n.2 (citing *NLRB* v. *Bildisco & Bildisco,* 465 U.S. 513 (1984) and *Tulsa Professional Collection Services, Inc.* v. *Pope,* 485 U.S. 478 (1988)).

Section 6 of the legislation reponds to the *Wilks* decision by adopting just such a remedial scheme. The provision is intended to promote the speedy and final resolution of employment discrimination cases while also ensuring that nonparties who may be adversely affected by a court decree resolving such a case have an adequate opportunity to challenge the decree.

Section 6 would add a new section 703(m) to Title VII. Subsection 703(m)(1) sets forth a rule that precludes, in three situations, challenges on constitutional or federal civil rights law grounds to employment practices that implement a litigated or consent judgment or order resolving a claim of employment discrimination under the Constitution or federal civil rights laws.

First, subsection 703(m)(1)(A) would preclude a challenge to an employment practice implementing such a decree by a person, who, prior to the entry of the decree, had both notice from any source of the proposed decree sufficient to apprise such person that the decree might affect his or her interests, and a reasonable opportunity to present objections to the decree. The provision requires actual notice of the proposed decree sufficient to apprise the would-be challenger that the decree might affect his or her interests.

Second, subsection 703(m)(1)(B) would preclude a challenge by a person as to whom the requirements of subection 703(m)(1)(A) are not satisified, if the court determines that the interests of such person were adequately represented by another person who did challenge the decree.

And third, subsection 703(m)(1)(C) would preclude a challenge by persons as to whom the requirements of subsection 703(m)(1)(A) are not satisfied, if the court determines that reasonable efforts were made to provide notice to interested persons consistent with the constitutional requirements of due process of law. The determination to be made by the court under subsection 703(m)(1)(C) shall be made before entry of the decree, except that if the decree was entered before enactment of the legislation, the determination may be made at any reasonable time.

Subsection 703(m)(1) does not require a court, *sua sponte,* to use any of the procedures set forth therein before adopting a decree resolving a Title VII case. But where the requirements of subsection 703(m)(1) have been met, the provision bars subsequent challenges to the decree, except under certain circumstances.

Subsection 703(m)(2) sets forth exceptions to the preclusion rules set forth in subsection 703(m)(1). Subsection 703(m)(2)(A) makes it clear that subsection 703(m)(1) does not alter the standards for determining whether a person may intervene in an action under Rule 24 of the Federal Rules of Civil Procedure. A person wishing to challenge an employment practice that implements a court decree will thus retain the right under Rule 24 to seek to intervene in the proceeding in which the decree was entered; and the court will determine whether intervention is appropriate through reference to the principles that have developed under Rule 24.

Subsection 703(m)(2)(B) provides that subsection 703(m)(1) does not apply to the parties to the action in which the decree was entered, to members of a class represented or sought to be represented in such action, or to members of a group on whose behalf relief was sought in such action by the Federal government. It is the Committee's intention that existing law shall continue to determine the circumstances under which persons in the three categories set forth in subsection 703(m)(2)(B) may be permitted to bring, or precluded from bringing, collateral attacks on court decrees.

Subsection 703(m)(2)(C) provides that subsection 703(m)(1) does not prevent challenges to a court decree on the ground that the decree was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction. This provision incorporates the common law exception to the general rule precluding collateral attack on judgments. *See Wilks,* 109 S. Ct. at 2189 (Stevens, J., dissenting); Restatement (Second) of Judgments secs. 69–72 (1982).

Subsection 703(m)(3) sets forth the rules governing venue for actions challenging employment practices implementing court decrees that are not precluded by subsection 703(m). Such actions are to be brought in the court, and if possible before the judge, that entered the decree. Nothing in the subsection shall preclude a transfer of such an action pursuant to 28 U.S.C. section 1404, which permits transfer where the interests of justice require.

Section 6 is Constitutional

The preclusion rule set forth in subsection 703(m) is fully consistent with the Due Process Clause. The fundamental requirements of due process are notice and an opportunity to be heard. The leading case describing the nature of these requirements in the context of finality is *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), a case concerning the constitutional sufficiency of notice given to trust beneficiaries regarding litigation involving the trust. There, the Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case, these conditions are reasonably met, the constitutional requirements are satisfied. 339 U.S. at 314–15 (citations omitted).

Subsection (A) precludes subsequent challenges to an employment practice implementing a court decree by a person, who, prior to the entry of the decree, had both actual notice from any source of the proposed decree, and a reasonable opportunity to present objections to the decree. The actual notice required under this subsection must be sufficient to apprise the recipient that the decree might affect his or her interests. That requirement satisfies the constitutional requirement that notice must be such that it will "apprise [the person] of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 14 (1978).

The requirement that the person be afforded a reasonable opportunity to present objections to the decree meets the due process requirement for "an *opportunity* . . . granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case." *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971) (citation omitted). Thus, the provision's requirements of actual "notice" and a reasonable opportunity to be heard closely track the constitutional requirements as articulated in *Mullane* and later cases.

Subsection (B) would preclude challenge by a person as to whom the requirements of subsection 703(m)(1)(A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who did challenge the decree. In *Wilks* itself, the Court recognized the existence of a limited exception to the general rule against precluding claims by nonlitigants, where a person, although not a party, "has his interests adequately represented by someone with the same interests". 109 S. Ct. at 2184 n.2 (citing, *inter alia*, *Hansberry* v. *Lee*, 311 U.S. 32 (1940); Fed. R. Civ. P. 23).

One of the exceptions to the general rule is embodied in Federal Rule of Civil Procedure 23, under which a person who is a member of a class represented by the individual representatives in a class action is barred from bringing a subsequent suit relitigating claims that were finally determined in the class action. Rule 23(a) permits class action suits only where the representatives "will fairly and adequately protect the interests of the class." *See* Wright & Miller, Federal Practice & Procedure: Civil sec. 1759 *et seq.* (2d ed. 1986).

Subsection (B) sets a standard closely analogous to that of Rule 23. Proposed subsection 703(m)(1)(B) would permit preclusion of subsequent challenges to court decrees by persons whose interests "were adequately represented by another person who challenged such judgment or order prior to or after" its entry. As Laurence H. Tribe, Tyler Professor of Constitutional Law at Harvard Law School, testified during the Committee's hearings, the "federal decisional law strongly" indicates that subsection (B) could not be held unconstitutional "without casting a serious constitutional shadow upon Federal Rule of Civil Procedure 23(b)(1) . . ."[41]

Finally, subsection (C) precludes challenges by persons who did not receive actual notice of the decree, where "the court that entered the [decree] determines that reasonable efforts were made to provide notice to interested persons consistent with the constitutional requirements of due process of law." Whether particular efforts to notify interested persons of a proposed decree satisfy subsection (C) should be determined by the court that entered the decree through application of the principles set forth in *Mullane* and its progeny. *Mullane* itself recognizes that due process is satisfied so long as reasonable efforts are made to give notice to interested persons, even if particular interested persons do not actually receive notice. There the Court ruled that attempts at notice through publication of advertisements in local newspapers were a constitutionally sufficient means to seek to notify persons whose identities and addresses could not reasonably be ascertained. 339 U.S. at 317-8. Since subsection (C) permits preclusion of subsequent challenges only where constitutionally adequate notice was provided to interested persons, it clearly is consistent with the Due Process Clause.

In sum, section 6 satisfies the constitutional requirements of due process as expounded by the Supreme Court. As Professor Tribe concluded, "[t]aken in its entirety, Section 6 can be best understood as Congress' even-handed effort to insulate employment discrimination judgments and consent decrees from incessant relitigation while complying with constitutional due process guarantees. I believe it succeeds in this attempt."

Section 6 is fair to all interests

Section 6 does not favor in any way racial minorities, women, or any other class of litigants in employment discrimination cases. Title VII suits can be brought on behalf of whites or males.[42] The

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[41] Rule 23(b)(1) permits a class action to be maintained where the prosecution of separate actions by or against individual members of the class would create a risk of either (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Rule 23 does not expressly require individual notice to be given to members of Rule 23(b)(1) class actions.

[42] *See, e.g., Jurgens* v. *EEOC*, 29 FEP Cases 1561 (N.D. Tex. 1982) (racial discrimination class action finding discrimination in promotion against white male attorneys at the EEOC); *Craig* v. *Alabama State Univ.*, 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd*, 614 F.2d 1295 (5th Cir.), *cert. denied*, 449 U.S. 862 (1980) (racial discrimination case finding discrimination against whites in

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provision would apply in the same fashion regardless of whether a court degree resolved a claim brought by whites or blacks, by women or by men. And the exceptions to the general preclusion rule set forth in subsection 703(m)(2) similarly do not favor or disfavor any particular group.

Thus, rather than insulating court decrees that order race-conscious remedies from challenge, the procedures set forth in section 6 of the bill are likely to result in the adoption of decrees that have withstood challenges by all interested persons *prior* to their adoption. In that respect, the provision is likely to result in the adoption of fewer controversial court decrees.

CLARIFYING AND EXTENDING THE STATUTE OF LIMITATIONS

Section 7(a)(1) of the Civil Rights Act of 1990 amends Section 706(e) of Title VII to make the statute of limitations for a Title VII action two years. This allows the victim of discrimination on the basis of gender, national origin, or religious affiliation an amount of time to file EEOC charges more comparable to that allowed a victim of race discrimination who sues under 42 U.S.C. section 1981.[43] Section 10(1) amends section 717 to increase from thirty to ninety days the statute of limitations for filing a civil action against the head of a department, agency, or unit of the federal government after a final agency action on a complaint of discrimination.

Section 7(a)(2) would overturn the Supreme Court's decision in *Lorance* v. *AT&T Technologies,* 109 S. Ct. 2261 (1989), by providing that the statute of limitations for filing a Title VII charge begins to run from the date on which an unlawful employment practice occurred or "has been applied to affect adversely the person aggrieved, whichever is later." This will assure that the Title VII limitations period will not commence to run so soon that it becomes difficult or impossible for a victim of discrimination to obtain the protection of the law.

Under section 7(a)(2), the limitation period begins to run on the later of the date that an unlawful employment practice occurred or the date on which a complaining party suffers an adverse effect from the practice. With respect to the latter, "adverse effect" provision, while the mere adoption of a rule or the making of a decision may cause some injury, the statute of limitations only begins to run when the rule or decision is applied actually to affect adversely the conditions or existence of the worker's employment.

By basing the limitations period on the date on which a rule or decision was applied to cause an injury, section 7(a)(2) avoids the uncertainty and disputes that would arise if the courts were required to determine in each case whether there was a point in time prior to that actual injury when it was in some sense inevitable that the injury would occur. The point of actual adverse effect is

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administrative, teaching, clerical and support positions at predominately black institution); *Smith* v. *Staats*, C.A. No. 78-0098 (D.D.C. 1979) (class action on behalf of white male employees of General Accounting Office).

[43] Under 42 U.S.C. sec. 1981, the statute of limitations, while it varies by state, is typically two or three years. *See, e.g. Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987) (two years); *Runyon* v. *McCrary*, 427 U.S. 160 (1976) (two years); and *Gordon* v. *National Youth Work Alliance*, 675 F.2d 356 (D.C. Cir. 1982) (three years).

the most easily identifiable date, providing both the potential complaining party and the respondent with a clear basis for calculating with certainty when the applicable limitations period will expire. Requiring an employee to bring suit at any point before the policy at issue has caused concrete actual adverse effect entails an undesirable risk that the suit, or Title VII charge, will prejudice the employee's informal efforts to resolve the dispute without resort to litigation.[44]

Section 7(a)(2) does not alter existing law regarding when an employer's discrete action is, and is not, a continuing violation of the law; rather, the provision concerns employer rules and decisions of on-going application which were adopted with an invidious motive. Where, as was alleged in *Lorance*, an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. In *Bazemore* v. *Friday*, 478 U.S. 385 (1986), for example, the salaries of minority workers had, for racial reasons, been set at a lower level than those of comparable white workers; the Supreme Court properly held that each application of that racially motivated salary structure, *i.e.*, each new pay check, constituted a distinct violation of Title VII. Section 7(a)(2) generalizes the result correctly reached in *Bazemore*. It does not, however, create a fresh cause of action every time an old act of discrimination yields additional harm; the injury must be brought about by a new application of the challenged practice or decision. Thus, in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), the application of a neutral seniority system did not itself constitute a violation even though the amount of seniority the plaintiff had accumulated had been reduced by an earlier, time-barred discriminatory dismissal.

Section 7(b) clarifies an aspect of Title VII closely related to the decision in *Lorance*.[45] Most employer rules, like the salary structure in *Bazemore*, remain in effect indefinitely once adopted. But when a seniority system is embodied in a collective bargaining agreement that is in force for only a limited period of time, the system must be reestablished, in the same or some modified form, by each contract that follows.

Section 7(b) would add to section 703(h) a new sentence to make it clear that where a seniority system or seniority practice is part of a collective bargaining agreement and the system or practice was included in the agreement with the intent to discriminate, it is the adoption of the system or practice of its application during the period that such collective bargaining agreement is in effect that is the unlawful employer practice. Thus, where an employee injured by the application of the seniority system or practice included in a particular collective bargaining agreement alleges that the system or practice was invidiously motivated, the resolution of that claim turns on whether the system or practice was included in that specific agreement for a discriminatory reason.

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[44] Of course, the mere adoption of a new employment rule might, in some circumstances, so alter an employee's prospects, or so affect the employee's available choices of jobs or benefits, as to cause a clear and palpable adverse effect. A rule or decision which so constricts the options available to an employee may still be challenged whenever the existence of the practice has such an impact; the law does not require an employee to imperil his or her employment prospects in order to test the legality of a practice.

[45] The *Lorance* case, and section 7(b), deal with disparate treatment challenges to seniority systems. Challenges to the bona fides of a seniority system continue to be governed by the principles set forth in the Supreme Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977).

In determining the purpose of a seniority provision of a collective bargaining agreement that is in force, where the same or a similar seniority provision was contained in earlier agreements between the parties, the purpose for including the provision in the earlier agreements may be relevant evidence.

PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION

Section 8 of the legislation amends section 706(g) of Title VII to permit courts to award damages in cases of intentional discrimination. The provision is intended to provide in Title VII for damage awards in cases of intentional discrimination in employment in the same circumstances in which such awards are now permitted under 42 U.S.C. section 1981 in intentional race discrimination cases.

The bill would allow compensatory damages to be awarded where an unlawful employment practice is established, except where the unlawful employment practice is based on disparate impact (as set forth in proposed section 703(k)). Punitive damages may also be assessed in such cases where the respondent (other than a government, governmental agency or political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others. This language is intended to set the same standard courts have applied under section 1981. *See, e.g., Rowlett* v. *Anheuser Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987); *Beauford* v. *Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1108 (6th Cir.), *cert. denied,* 484 U.S. 913 (1987). *See also Smith* v. *Wade,* 461 U.S. 30, 56 (1983) (construing 42 U.S.C. sec. 1983).

The damages remedies added by section 8 are in addition to the equitable remedies, including backpay and interest, now available under Title VII. But the bill makes clear that a court may not award as compensatory damages backpay or any interest thereon, thus avoiding the possibility of duplicative recoveries.

To protect the rights of all persons under the Seventh Amendment, the bill also makes it clear that in cases where compensatory or punitive damages are sought under Title VII, any party may demand a trial by jury. Because compensatory and punitive damages may not be sought in disparate impact cases, a jury trial would not be available in such cases.

ATTORNEY'S FEES PROVISIONS

Section 9 of the legislation concerns attorney's fees in Title VII litigation. Section 9(2) amends the present attorney's fees provision in Title VII, section 706(k) (42 U.S.C. sec. 2000e–5(k)), to confirm explicitly that the provision authorizes the courts to award prevailing parties reasonable expert fees and other litigation expenses along with attorney's fees. This will ensure that prevailing parties in Title VII cases, like prevailing parties under the Equal Access to Justice Act, 28 U.S.C. sec. 2412(d)(1)(A), and twenty-seven other federal statutes, may recover expert fees. The provision is necessary to express Congress's intention that the rule announced in the Supreme Court's decision in *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), not be applied in the civil rights context.

Section 9(3) amends section 706(k) to authorize the award of attorney's fees not *as part of* the costs recovered by a prevailing party, but instead to authorize such a party to recover attorney's fees *and* costs. This is intended to overrule the Supreme Court's decision in *Marek* v. *Chesny*, 473 U.S. 1 (1985), which held that plaintiffs "who reject an offer [of judgment under Fed. R. Civ. P. 68] more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected." 473 U.S. at 10. The provision will ensure that Title VII claimants are treated in the same way as plaintiffs under the Fair Housing Act, the Age Discrimination in Employment Act, and numerous other federal statutes. Under amended section 706(k), an offer of judgment under Rule 68 would not bar recovery of attorney's fees incurred following rejection of the offer and recovery of a less favorable judgment at trial.

Section 9(4) would add two new provisions to section 706(k). The first, section 706(k)(2), provides that no consent order or judgment settling a Title VII claim may be entered, and no stipulation of dismissal of such a claim may become effective, unless the parties and their counsel attest to the court that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement. This provision is intended to counteract the Court's ruling in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), which held that defense counsel in civil rights cases were not precluded from conditioning proposed settlements upon a waiver of attorney's fees.

The Committee notes that as the Supreme Court stated in *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 454 n.15 (1982), "[i]n considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees." For that reason, section 706(k)(2) would not preclude plaintiffs and their counsel from reaching settlements concerning the amount of fees or from knowingly and voluntarily agreeing, without compulsion, to waive all or substantially all the attorney's fees to which they would be entitled under Title VII. The section does, however, seek to eliminate the coerced waiver of all or substantially all such fees through the attestation procedure described above.

The second provision added by section 9(4) is intended to make clear, contrary to *dicta* in *Independent Federation of Flight Attendants* v. *Zipes*, 109 S. Ct. 2732 (1989), that prevailing Title VII plaintiffs are entitled to recover reasonable attorney's fees and costs with respect to all proceedings in which they participate in order to defend or enforce the relief they obtain in Title VII cases. For example, where a court decree is entered in a Title VII case and a third party intervenes in an attempt to challenge the decree, this section makes clear that the original prevailing plaintiffs would be entitled to receive fees and costs for their efforts to defend the judgment or decree in response to the intervention. Similarly, if a third party brings a separate suit in an unsuccessful attempt to challenge a judgment or consent decree in a previous Title VII case, the original prevailing Title VII plaintiffs would be entitled to receive attorney's fees and costs if they intervene in the second suit to defend the previous judgment or decree.

This section is not intended to overrule the holding in *Zipes* that an unsuccessful intervenor in a Title VII suit should not be required to pay attorney's fees except where the intervenor's action was "frivolous, unreasonable, or without foundation." *Zipes*, 109 S. Ct. at 2736. *Accord, Christianburg Garment Co.* v. *EEOC,* 434 U.S. 412, 421 (1978). Instead, in accordance with the views expressed in Justice Blackmun's concurring opinion in *Zipes,* the section provides that except under these circumstances, the original defendant in the Title VII action would be responsible for the reasonable attorney's fees and costs incurred by the original plaintiffs in defending or enforcing the original judgment; an intervenor or subsequent plaintiff challenging such a judgment would be responsible only where the challenged action was frivolous, unreasonable, or without foundation.

Similarly, if a third party brings a successful "reverse discrimination" Title VII suit against an employer challenging a previous Title VII decree, in which the original plaintiffs intervened, the third party could obtain attorney's fees and costs from the employer. The intervenors in the second suit would not be responsible for such fees and costs unless their actions during the course of the second suit were frivolous, unreasonable, or without foundation. It would not be frivolous, unreasonable, or without foundation for prevailing plaintiffs in an original Title VII suit to move to intervene in a subsequent action in order to defend the relief obtained in the original action.

PROVIDING FOR INTEREST IN ACTIONS AGAINST THE FEDERAL GOVERNMENT

Section 10(2) would amend section 717 (42 U.S.C. section 2000e-16) to permit courts in Title VII actions against the federal government to award prevailing parties the same interest to compensate for delay in payment as is available in cases involving parties other than the federal government. This provision is intended to waive the sovereign immunity of the United States and overrule the Supreme Court's decision in *Library of Congress* v. *Shaw,* 478 U.S. 310 (1986), which held that the doctrine of sovereign immunity barred an award of interest or other compensation for delay in payment in a Title VII action against the federal government.

RULES OF CONSTRUCTION

There are well established canons of statutory construction, and among them has been the widely accepted canon that remedial statutes, such as civil rights laws, are to be broadly construed. This canon has not been utilized in many instances, as the decisions of the spring of 1989 illustrate, and consequently, Congress has been compelled to adopt legislation to correct unduly narrow Supreme Court interpretations of previously enacted civil rights laws.

Departure from the established rules of statutory construction, such as the rule favoring broad construction of civil rights laws, interferes with the ability of Congress to express its will through legislation. Such rules of statutory construction are an essential part of the legal context in which Congress legislates and on which Congress relies.

Subsection (a) would amend Title XI of the Civil Rights Act of 1964 to codify the broad rule of construction which, along with other accepted rules of construction, was traditionally applied to civil rights statutes. When the terms of such a statute are susceptible to several alternative interpretations, the courts, consistent with the intent of the Congress in enacting that law, are to select the construction which most effectively advances the underlying congressional purpose to provide equal opportunity and to provide effective remedies.

Subsection (b) codifies in the civil rights area the well established rule that in construing federal laws protecting civil rights, the courts are not to infer that other federal laws protecting civil rights have implicitly repealed or amended such laws. For example, in construing federal civil rights laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age or disability, courts should not rely on the amendments made by the Act as a basis for limiting the theories of liability, rights and remedies available under civil rights laws not expressly amended by the Act.

RESTORING THE PROHIBITION AGAINST ALL RACE DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS

Section 12 of the Act is intended to overrule the Supreme Court's decision in *Patterson* v. *McLean Credit Union,* 109 S. Ct. 2363 (1989), which adopted an incorrect, crabbed interpretation of the law known as section 1981 (42 U.S.C. sec. 1981). Section 1981 guarantees to all persons the "same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." In *Patterson*, the Supreme Court ruled that this provision bars only discrimination in "the formation of a contract, . . . not to problems that may arise later from the conditions of continuing employment." *Id.* at 2372.

The Act would overrule *Patterson* by adding at the conclusion of section 1981 a new subsection (b) that would make it clear that the right to "make and enforce contracts" free from race discrimination protected by section 1981 includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." The Committee intends this provision to bar *all* race discrimination in contracts. The list set forth in the subsection (b) added by the Act is intended to be illustrative rather than exhaustive.

NO EFFECT ON LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AGREEMENT AND CONCILIATION AGREEMENTS

Section 13 of the legislation is intended to make it clear that nothing in the amendments made by the Act affects court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law. Thus, the lawfulness of such court-ordered remedies, affirmative action, or conciliation agreements is to be determined under the law [46] without reference to the amendments made by the Act.

SEVERABILITY

Section 14 expresses the Committee's intention that, in the event that any provision of the Act, amendment made by the Act, or the application of any provision of the Act to any person or in any circumstance is held invalid, the remainder of the Act, of the amendments made by the Act, and the application of such provision to other persons and circumstances shall not be affected.

APPLICATION OF AMENDMENTS AND TRANSITION RULES

Section 15 provides effective dates for each section of this legislation, sets forth transition rules which permit courts to vacate certain orders inconsistent with the legislation, and allows revival of certain claims which would otherwise be untimely. As used in this section, the word "proceedings" includes both judicial actions as well as administrative proceedings.

Subsection 15(a) provides that Sections 4, 5, 6, 7(a) (2) through (4), and 12 of the legislation, which are intended to address the effect of specific Supreme Court decisions, shall apply to all proceedings pending on or commenced after the date on which the Supreme Court issued the applicable decision. This subsection also provides that certain other sections of the legislation, including those which are not addressed to the effect of specific Supreme Court decisions, shall apply only to proceedings pending on or commenced after the date of enactment. The definitions added by section 3 of the bill, which are used in several sections of the bill, will apply to any actions or proceedings to which these sections apply.

With respect to the provisions of the bill overruling Supreme Court decisions and restoring prior law, there can be no manifest injustice in applying the restored law to actions or proceedings pending on the dates the decisions were announced. To the contrary, because such cases were likely filed in reliance on the prior law, it would be manifestly unjust to apply the rules announced by the Supreme Court to cases decided after those decisions but before the date of enactment of the Act. *See Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984).

Subsection 15(b) sets forth transition rules governing court orders that are inconsistent with Sections 4, 5, 6, 7(a) (2) through (4), or 12. This subsection requires courts, upon request, to vacate any such orders entered between the effective date of the applicable section and the date of enactment. Requests for such relief must be made not later than one year (six months in the case of orders inconsistent with Section 6) after the date of enactment. This subsection also provides that certain individuls adversely affected by the application of Section 6 (either by denial of a challenge covered by that section or by the vacating of an order pursuant to this subsection) shall have, for a period of one year from the date of enactment, the same right of intervention in certain proceedings described therein as they had on the effective date of Section 6.

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[46] *See, e.g., Steelworkers* v. *Weber*, 443 U.S. 193 (1979); *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986); *Local 28 of the Sheet Metal Workers International Association* v. *EEOC*, 478 U.S. 421 (1986); *Local Number 93, International Association of Firefighters* v. *City of Cleveland*, 478 U.S. 501 (1986); *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987); *United States* v. *Paradise*, 480 U.S. 149 (1987).

Subsection 15(c) permits the revival of claims or charges that otherwise would have lapsed due to the statute of limitations, if the claimant or charging party shows that the claim or charge was not filed because of a rule or decision which is altered by Sections 4, 5, 7(a) (2) through (4), or 12. This subsection permits the period of limitations to be tolled from the effective date of the applicable section to the date of enactment.

VII. Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules, the Committee has prepared the following statement regarding the impact of the legislation:

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 2104 would affect the law applicable to employers who are currently covered by Title VII or section 1981. All but one of the provisions amend Title VII of the Civil Rights Act of 1964, which covers only employers with 15 or more employees. Approximately 3.7 million private employers, with approximately 11 million employees, are covered by section 1981 and not Title VII.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

S. 2104 will eradicate barriers to full participation in the work force that are caused by discrimination on the basis of race, gender, national origin, or religious affiliation. It will impose no new economic burdens on consumers or employers. Instead, by allowing victims of employment discrimination to assert their right to be free of such discrimination, the bill will improve the economic wellbeing of our country. It will encourage efficient and humane business practices that will allow every working citizen to achieve his or her full potential in our work force. This change will increase the economic benefits to employers and consumers.

C. IMPACT ON PERSONAL PRIVACY

This bill will have no impact on personal privacy of the individuals affected.

D. IMPACT ON PAPERWORK AND REGULATIONS

S. 2104 simply amends current law and will require no new regulations, so the impact on paperwork will be negligible. The bill does not require that any money be spent, so its inflationary impact will be zero. In addition, the bill will impose no new recordkeeping requirements.

VIII. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 8, 1990.

Hon. EDWARD M. KENNEDY,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2104, as ordered reported by the Committee on Labor and Human Resources on April 4, 1990. This bill could affect the federal budget by adding administrative costs due to the potential increase in the number of complaints handled by the Equal Employment Opportunities Commission and by increasing compensation payments in the case of settlements against federal employers. Each of these potential costs is discussed below.

This bill would restore the civil rights protections that were limited by recent Supreme Court decisions and would strengthen existing protections and remedies available under federal civil rights laws. This bill would extend the definition of illegal employment practices and would allow for the award of compensatory damages in cases of intentional discrimination. This bill could affect the federal budget in three ways.

First, there could be additional administrative costs. The number of complaints the Equal Employment Opportunities Commission (EEOC) would be required to investigate could increase. This bill could increase the number of complaints filed with the EEOC because the time for filing a complaint is increased from 180 or 300 days to 2 years and because compensatory damages could be awarded in some cases. Based on discussions with the staff at the EEOC, it is difficult to estimate precisely the increase in administrative costs; however, the costs are not expected to add significantly to the EEOC's current $185 million budget. The workload of the Department of Justice (DOJ) could also increase as a result of S. 2104, but according to staff at the DOJ, the additional administrative costs would be minimal.

Second, there could be additional compensation costs. Currently, if a discrimination complaint is filed against the federal government, the complaint can be resolved between the federal agency and the complainant before a formal Title VII charge is filed or the complaint can be resolved through an EEOC hearing. If the federal agency is found to be at fault through either process, the complainant is reinstated and is awarded only back pay—compensatory damages are not allowed under current law. According to staff at the EEOC, there were 5,800 administrative settlements involving the federal government that cost $4.6 million in fiscal year 1989. These settlement costs could increase under the bill because compensatory damages could be awarded in some cases involving the federal government. While it is difficult to estimate what the payment of compensatory damages might add to settlement costs, it is not expected to be large. According to a survey done by the law firm of Shea and Gardner, compensatory damages were awarded in approximately 10 percent of the cases not involving the federal government that were decided between 1980 and 1990. The initial awards ranged from $1.00 to $300,000 with the majority concentrated at the lower end of the range.

Finally, there could be an increase in the number of future complaints against the federal government because of the prospect of payment of compensatory damages in addition to payments for back pay. CBO, however, has no basis for projecting potential increases in the number of discrimination complaints against the federal government.

The budgets of state and local governments also could be affected. As in the case of the federal government, there could be an increase in the number of cases brought against state and local governments. However, CBO is unable to estimate this number.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Cory Leach (226-2820).

Sincerely,

ROBERT D. REISCHAUER,
Director.

IX. MINORITY VIEWS OF SENATORS HATCH, THURMOND, AND COATS

There is unanimous support in Congress for the basic principle of equal employment opportunity for all Americans without regard to race, ethnicity, religion, or gender, as required by Title VII of the Civil Rights Act of 1964. The promise of S. 2104, however, is equal outcomes for groups, not equal opportunity for individuals. S. 2104 also promises much more: first, prolonged, costly litigation under Title VII, rather than conciliation and settlement, and, second, denial of equal access to court for the assertion of the fundamental rights of equal opportunity of the laws and to be free of invidious discrimination, rather than assuring every American his or her day in court.

I. INTRODUCTION

S. 2104 "goes far beyond addressing recent Supreme Court rulings, and amounts to a virtual wish list for plaintiffs in employment discrimination litigation." Daily Labor Reporter, February 8, 1990, nonpartisan newsletter.

A. TWO BASIC MYTHS ABOUT S. 2104

A variety of misconceptions have already grown up surrounding S. 2104; including these two:

Myth: S. 2104 only overturns a handful of Supreme Court decisions from 1989.

Fact: (1) S. 2104 not only overturns *Wards Cove Packing Co., Inc.* v. *Atonio*, 109 S.Ct. 2115 (1989); *Martin* v. *Wilks*, 109 S.Ct. 2180 (1989); *Patterson* v. *McLean Credit Union*, 109 S.Ct. 2363 (1989); and *Lorance* v. *AT&T Technologies, Inc.*, 109 S.Ct. 2261 (1989); it also overturns, in whole or substantial part, at least the following: *Price Waterhouse* v. *Hopkins*, 109 S.Ct. 1775 (1989); *Marek* v. *Chesny*, 473 U.S. 1 (1985); *Evans* v. *Jeff D.*, 75 U.S. 717 (1986); *New York Transit Authority* v. *Beazer*, 440 U.S. 568 (1979); *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); *Independent Federation of Flight Attendants* v. *Zipes*, 109 S.Ct. 2732 (1989); *Crawford Fittings Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977); and others as well. Some commentators have stated that S. 2104 overturns at least 25 decisions in whole or in part.

(2) Moreover, this bill adds compensatory and punitive damages and jury trials for certain Title VII cases—which, of course, is not a response to any Supreme Court decision. Further, the bill extends the statute of limitations from six months to two years,

again, not in response to any Supreme Court decision. It is inaccurate to assert that S. 2104 simply restores the law. S. 2104 completely rewrites Title VII.

(3) S. 2104 effectively amends over 70 civil rights statutes giving federal judges and bureaucrats carte blanche to undertake expansive interpretations of these laws.

Myth: The *Wards Cove Packing Co., Inc.*, v. *Atonio*, 109 S.Ct. 2115 (1989), decision overruled *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and this bill restores *Griggs.*

Fact: *Wards Cove* retains the disparate impact standard of showing a Title VII violation as developed by *Griggs*, as well as the use of statistics to establish a prima facie case of disparate impact. *Griggs* did not place a burden of persuasion on the employer to prove its innocence in the face of a showing of mere racial, ethnic, or gender imbalance, as S. 2104 does. Moreover, *Griggs* did not define "business necessity" as either "essential to effective job performance," as S. 2104 currently does, or as a "substantial and demonstrable relationship to effective job performance," as the Kennedy-Danforth revision will define it. One will search the *Grigg* case in vain for either phrase. *Griggs* said that employment standards must be "job-related"; i.e., they must have "a manifest relationship to the employment in question." 401 U.S. at 431, 432. *Wards Cove* is fully consistent with *Griggs.*

Indeed, in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979) the Supreme Court made clear that the plaintiff retains the ultimate burden of persuasion in a disparate impact case under Title VII and that the employer must show that its employment practices significantly serve a legitimate goal of the employer, not that they are "required" by such goals. 440 U.S. at 587 and n.31. As such, the Supreme Court rejected the formulation of S. 2104 in its 1979 *Beazer* decision and used language describing a Title VII disparate impact case virtually identical to that used in *Wards Cove.* Unsurprisingly, the Committee Report makes no reference to the *Beazer* decision.

B. SUMMARY OF MAJOR FLAWS IN S. 2104

Hiring the most qualified person for a job will no longer be a defense to a charge of discrimination.

Employment standards will be seriously eroded.

Employers will be exposed to massive back pay liability if their jobs do not reflect statistical balance, i.e., quotas, based on race, ethnicity, color, gender and religion.

Employers will be required to resort to quota hiring and promotion in order to avoid future liability under the revised theory of discrimination in Sections three and four of the bill.

Some Americans will be denied their equal opportunity to a day in court to assert the most fundamental rights of all: the right to equal protection of the laws and the right to be free of invidious discrimination.

Title VII will become a bonanza for lawyers.

Title VII will be dramatically transformed from a statute encouraging conciliation, settlement of claims, and quickly providing relief to victims of discrimination into a statute where protracted and costly litigation will be the tool of first resort.

S. 2104 effectively amends over 70 Civil Rights statutes, giving federal judges and bureaucrats carte blanche to undertake expansive interpretations of these laws.

C. TWO SUPREME COURT DECISIONS—LORANCE AND PATTERSON—MERIT REVERSAL

The *Lorance* and *Patterson* decisions do merit reversal. I have introduced legislation to do so, namely S. 2166. S. 2104, however, is a dramatic overreaction and seeks to shred the fabric of Title VII law.

II. SECTIONS 3 AND 4 WILL ERODE WORKPLACE STANDARDS AND LEAD TO QUOTAS

There are two theories of discrimination giving rise to liability under Title VII. Under the disparate treatment theory (also called the intent theory), an employer deliberately excludes a person or group of persons from job opportunities because of their race, color, national origin, religion, or gender. For example, in its most stark form, an employer says it will not hire women or blacks for certain jobs.

Under the disparate impact theory, an employer, without intending to keep anyone out of a job because of a characteristic such as race, uses a neutral employment device or devices, such as a test or a height requirement, which sreeens out a higher proportion of one group than another and the employment device is not job-related.

A. S. 2104 DISTORTS THE RULES OF CONDUCTING A DISPARATE IMPACT CASE

1. Current law

Under current law, a neutral device (or devices) which causes a disproportionate impact, i.e., *disparate impact*, on a particular racial, ethnic, or gender group and is not job-related is illegal. Under this theory of discrimination, the burden of persuasion is on the plaintiff to prove the existence of *each* of these elements of wrongdoing—just as the burden is on the plaintiff to establish the elements of a tort or contract claim.

Burdens of production and persuasion.—Current case law, however, such as *Wards Cove Packing Co. Inc.* v. *Atonio, supra,* facilitates the plaintiff's ability in a disparate impact case to meet his or her burden of providing that illegal discrimination occurred. The plaintiff need not prove all of these elements in its initial presentation to the court. At the outset, the plaintiff merely has to identify the specific employment practice (or practices) he or she is complaining about and show that it causes a disparate impact on his or her group. This constitutes the plaintiff's prima facie case.

At that point in the case, the employer must come forward with a credible explanation justifying the use of the employment practice (or practices) in question. This is a burden of production of evidence, or articulating legitimate reasons for an employment practice. Once the employer meets this burden, the case has now been sufficiently focused that the plaintiff is then put to his or her ultimate burden of persuasion of proving that the employer's explanation is pretextual, or otherwise unpersuasive, i.e., that the employer has discriminated. The plaintiff, at this stage, may also show that even if the practice is job-related, there is another practice equally effective for the employer which causes less disproportionate impact. Thus, the plaintiff never has to disprove all possible justifications for an employer's practice; the plaintiff's task is simplified by forcing the employer to explain the basis for its practice. It is then—and only then—that the plaintiff must prove that the practice is not job-related. This is fully consistent with the manner in which garden-variety Title VII *intent* cases are tried, and with the Rules of Federal Evidence (Rule 301). Moreover, from the outset of the case, the plaintiff has the full opportunity for discovery as to the employer's explanations and the evidence in support of those explanations.

For example, if a plaintiff shows that a fire department's employment test disproportionately denies members of a particular group a job opportunity, it is then up to the employer to articulate a justification for the test. The employer might argue that it relied on a 20 year old study by an industrial psychologist which concluded that the test will yield qualified firefighters. At this point, the plaintiff now is on notice as to the justification for the test. The plaintiff can then attack the study's methodology, introduce other evidence that it is faulty, or that other tests do an equal or better job of selecting firefighters and have less impact on the group. The plaintiff need not rebut every possible justification for the test, only that which is proffered by the employer.

S. 2104 drastically rewrites the manner in which disparate impact cases are brought under Title VII. In so doing, it overturns Supreme Court decisions in *Wards Cove Packing Co., Inc., Griggs* v. *Duke Power Co.*, and *New York Transit Authority* v. *Beazer, supra*, and others.

First, a plaintiff need not identify the specific employer practice or practices allegedly causing the disparate impact—the imbalance. Instead, a plaintiff need merely point to a numerical imbalance in a job and allege that all of the employer's hiring (or promotion) practices cause the imbalance.[1]

Second, at this point, rather than shift to the employer a burden of producing evidence explaining its employment practices, with the plaintiff retaining the ultimate burden of *persuasion*, a burden of persuasion shifts to the employer, i.e., the employer must prove an affirmative defense. This seemingly technical change is highly significant: it makes racial, ethnic, and gender imbalance *alone* illegal. Unless every job is virtually a perfect match with the appropriate outside labor market, the employer is guilty of discrimination. S. 2104 makes Title VII a statute whose mandate is not equal opportunity for individuals, but equal numerical outcomes for groups.

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[1] The Committee Report wrongly suggests if the plaintiff knows that a specific employment practice causes the imbalance, the plaintiff would only challenge that practice. That is simply not true under this bill. There is no requirement in such a case that a plaintiff refrain from alleging that all of the employer's practices cause the imbalance and thereby shift the burden to the employer to prove its innocence by justifying all of its practices. The bill, as written, permits a plaintiff to allege that since all of an employer's practices, and not just one of them, yields the group of employees the employer hires or promotes, all of the practices cause the imbalance. Plaintiff's lawyers would be remiss not to take advantage of this allegation.

Third, the employer has to do more than produce evidence showing its challenged practice(s) is "related to job performance . . .", has "a manifest relationship to the employment in question," *Griggs* v. *Duke Power Co.*, 401 U.S. at 432, and "serves, in a significant way, the legitimate employment goals of the employer," *Wards Cove Packing Co., Inc.* v. *Atonio*, 109 S. Ct. at 2125–26. Instead, the employer must prove either that its specific practices do "not contribute to the disparate impact", an impossible burden, or that they "bear a substantial and demonstrable relationship to effective job performance," in the new phrase which will be offered on the Senate Floor by Senators Kennedy and Danforth, and which does not appear in *Griggs*.

How does an employer avoid almost certain, costly liability under these new rules? Through hiring by numbers—by quota selections.

2. Wards Cove did not overturn Griggs; S. 2104 overturns Griggs

Wards Cove is nothing new. *Griggs* itself did not authorize plaintiffs to make disparate impact challenges against all of an employer's hiring or promotion criteria without showing which ones cause the statistical imbalance. *Griggs* did not shift the burden of persuasion to employers to prove their innocence. Moreover, *Griggs* defined "business necessity" as "job relatedness" and "manifest relationship to the employment in question," not "essential to effective job performance," as the Commitee-approved bill requires, or as bearing a "substantial and demonstrable relationship to effective job performance" in the new Kennedy-Danforth formulation.

The Supreme Court reconfirmed virtually all of this in 1979 in *New York Transit Authority* v. *Beazer*, 44 U.S. 568 (1979). The *Beazer* case involved a challenge to the New York Transit Authority's (TA) blanket no-drug rule, as it applied to methadone users seeking non-safety sensitive jobs. A lower court had found a Title VII disparate impact violation. The Supreme Court, however, reversed: "At best, the [plaintiffs'] statistical showing is weak; even if it is capable of establishing a prima facie case of discrimination, it is assuredly rebutted by TA's demonstation that its narcotics rule (and the rule's application to methodone users) if *'job related.'* " Id. at 587 (Emphasis added). The Court noted that the parties agreed "that TA's legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics. . . . Finally, the District Court noted that *those goals are significantly served by—even if they do not require*—TA's rule rule as it applies to all methodone users, including those who are seeking employment in non-safety-sensitive positions. The record thus demonstrates that TA's rule bears a *'manifest relationship to the employment in question.' Griggs* v. *Duke Power Co.*, 401 U.S. at 432. *Whether or not [plaintiffs'] weak showing was sufficient to establish a prima facie case, it clearly failed to carry [plaintiffs'] ultimate burden of proving a violation of Title VII.*" 440 U.S. at 587, n.31. (emphasis supplied). S. 2104 overrules this decision.

The Supreme Court speaks of "job-relatedness" to "legitimate" employment goals, "manifest relationship to the employment in question," not "substantial and demonstrable relationship to effective job performance," let alone the thoroughly discredited "essential" standard of the Committee-approved bill, which the Committee Report inexplicably continues to defend. It uses the terms "significantly served by," not "substantial and demonstrable." The standard used by the Court in *Beazer* is virtually the same formulation used in *Wards Cove*.

And, the Court in *Beazer* speaks of the *plaintiff's* ultimate burden of proving a Title VII disparate impact case, after the plaintiff makes out his or her prima facie case.

> Plaintiffs in disparate impact cases must identify the specific employer practice or practices causing the disparate impact.

As Justice White noted in *Wards Cove*, every prior disparate impact case the Supreme Court has heard "focused on the impact of *particular* hiring practices on employment opportunities for minorities" or women. 109 S.Ct. at 2124. See, e.g., *Griggs* v. *Duke Power Co.* 401 U.S. 424 (1971) (high school diploma; general intelligence tests); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) (written tests); *Washington* v. *Davis*, 426 U.S. 229 (1976) (written test); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height/weight requirements); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977) (denying all seniority when a woman goes on pregnancy leave; denying sick-leave pay to pregnant employees); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979) (no-narcotics use); *Connecticut* v. *Teal*, 457 U.S. 440 (1982) (written test); *Watson* v. *Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988) (supervisor's subjective judgment of employee applying for a promotion).

As Justice White said, "To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces,'" citing Justice O'Connor's plurality opinion in *Watson*. 109 S.Ct. at 2125.

A number of lower courts had indicated that specific practices must be shown to cause a disproportionate impact. *Robinson* v. *Polaroid Corp.*, 732 F.2d 1010, 1016 (1st Cir. 1984); *Latinos Unidos de Chelsea* v. *Secretary of Housing*, 799 F.2d. 774, 786–87 (1st Cir. 1986) (Title VII case); *Pope* v. *City of Hickory*, 679 F.2d 20, 22 (4th Cir. 1982); *Pouncy* v. *Prudential Ins. Co. of America*, 668 F.2d 795, 800–801 (5th Cir. 1982); *Spaulding* v. *Univ. of Washington*, 740 F.2d 686, 705–707 (9th Cir. 1984) *cert. den.* 469 U.S. 1036; *AFSCME* v. *State of Washington* 770 F.2d 1401, 1405–06 (9th Cir. 1985). While some lower court cases do not reflect this consensus, this holding breaks no new ground. Again, the purpose of S. 2104 is to overturn all of these decisions as well.

> Plaintiff, as is customary in civil cases, retains the ultimate burden of persuasion in a disparate impact case.

Justice Brennan wrote in *Price Waterhouse* v. *Hopkins*: "Conventional rules of civil litigation generally apply in Title VII cases," citing the Court's comment in *United States Postal Service Board* *of Governors* v. *Aikens*, 460 U.S. 711 (1983) that discrimination is not to be " 'treat[ed] . . . differently from other ultimate questions of fact.' " 109 S.Ct. 1775, 1792 (1989). One such rule is Federal Rule of Evidence 301: unless otherwise provided, "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

The use of the terms "show," "demonstrate," and "prove" in some Supreme Court disparate impact cases does not alone denote a burden of persuasion, as S. 2104's proponents incorrectly claim. Justice O'Connor in *Watson*: The *Griggs* "formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." 108 S.Ct. at 2790.

In some early Title VII *intent* cases, the Court used these same terms to describe the employer's burden. *Yet, the Court ruled that in Title VII intent cases, the employer's burden is one of production, not persuasion.* In short, the Court said that these terms are consistent with a burden of production. *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24, 25 (1978). See also *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).

The Supreme Court has also construed the term "burden of proof" in the Administrative Procedure Act (Section 7(c)) as "only the burden of going forward, not the burden of persuasion." *NLRB* v. *Transportation Management Corp.* 462 U.S. 393, 404 n.7 (1983).

Thus, the use of terms such as "show," "demonstrate," and "prove" in some earlier disparate impact cases, including the list of lower court cases provided by former Secretary of Transportation William Coleman, is also consistent with a burden of production.

Moreover, it is illogical to impose a heavier burden of justification on an employer accused of using a neutral device without intending to descriminate than the burden imposed on an employer accused of intentionally discrimination. *NAACP* v. *Medical Center, Inc.*, 657 F.2d 1322, 1333-1335 (3rd. Cir. 1981[2] After all, the worse actor is the employer who intentionally discriminates. Yet, if this bill becomes law, such an employer has an easier burden than one accused of disparate impact discrimination.

In *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n. 31, the Supreme Court said in 1979 that the plaintiff, after making a prima facie statistical showing, has the "ultimate burden of proving a violation of Title VII." Similarly, the Third Circuit, in *NAACP* v. *Medical Center, supra*, noted that "[a]s a practical matter, a procedural distinction between the impact and intent cases would cause unnecessary confusion in trial courts, particularly so in cases like the one at hand in which both theories are advanced. . . . It is difficult to understand that important interests would be served by imposing two different burdens on the defendant in a case of this nature. Certainly the multiplication of procedural devices is not a desirable development in trial practice." 657 F.2d. at 1335 (cite omitted).

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[2] The Committee Report, in seeking to rebut this argument, makes questionable use of Supreme Court precedents. A fuller explanation of these matters is contained in Appendix A of these views.

The Court said this in the context of trials conducted by judges. Imagine the confusion these two different burdens would cause in a jury trial.

Even if this bill did nothing else but shift a burden of persuasion to the employer, it would signal a profound change in Title VII. Mere imbalance in a job would become illegal, making quotas, not equal opportunity for individuals, title VII's touchstone.

Griggs Did not Require Employers To Show "Substantiality"

As introduced and approved by the Committee, the bill defined "business necessity" as "essential to effective job performance." This is one—but only one—of the components of Section 3 and 4 which would lead to the imposition of quota hiring and promotion. The newly created "essential" standard has no basis in Title VII or Supreme court precedent, and it has been thoroughly discredited. For example, 35 leading industrial psychologists wrote to Chairman Kennedy regarding the "essential" standard. They stated: "The purported restoration language certainly does not restore *Griggs;* it instead replaces it by creating a technically infeasible, subjective standard which the psychological profession and employers cannot meet of even define in advance. By thus depriving employers of the means by which they can define job-related systems designed to hire and promote on the basis of relative qualifications, it creates a litigation avoidance incentive to replace systems which recognize the value of relative merit with those which do not. It therefore demeans merit and encourages the hiring of the minimally qualified so as to avoid expensive and can't win inquiry." Letter, March 27, 1990.

The proponents of the bill, however, persisted in painting their effort to enact a brand new standard as merely restoring prior law and no threat to lead to quotas. Now that they have developed a second new standard which they will offer on the Senate Floor purportedly to address the bill's serious quota problem, what are we to make of their earlier protestations that the "essential" standard is restorative of prior law and not a quota threat? The same that we should make of their current representations that the new standard they will propose on the Senate Floor solves the quota problem. It, too, exceeds the requirements of prior law and is not based on *Griggs.*

Interestingly, the Committee Report, without blinking an eye, appears to treat the "substantiality" standard as synonymous with the "essentiality" standard and fully consistent with it. Regrettably, while the packaging may vary, proponents of the bill seem bent on imposing as many new requirements, standards, and burdens as possible.

Because the "essentiality" standard has been so thoroughly discredited by witnesses and others, and the proponents of the bill have announced their intention to offer a brand new "substantiality" Standard on the Senate Floor, these views will focus on the reported "new" language.

In *Griggs*, the Supreme Court said: "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be *related to job performance*, the practice is prohibited." 401 U.S. at 431. (emphasis supplied) Further, ". . . any given requirement must have a *manifest relationship* to the employment in question." Id. at 432. (emphasis supplied)

Nowhere is the "substantial and demonstrable relationship to effective job performance" standard mentioned in *Griggs*, let alone the discarded "essential" langange. *Wards Cove*, *supra*, which relied upon *Griggs*, is consistent with these formulations.

This job-relatedness or manifest relationship to the job standard is the consistent standard applied by the Supreme Court. This includes *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). There, the Court was uses the job-relatedness/manifest relationship standard. It does describe the *employer* as *arguing* that its height and weight requirements were "essential to effective job performance," but the Court noted the employer failed to provide any specific justification for these requirements. The Court itself in *Dothard* applied the *Griggs* job-relatedness/manifest relationship standard, not the essentially or substantially standard.

The Supreme Court used the same formulation in 1979 as it used in *Wards Cove*. The case was *New York Transit Authority* v. *Beazer*, 440 587 n.31.

While the new standard of "business necessity" to be offered on the Senate Floor is phrased differently from the Committee-approved "essential" standard, it remains virtually as onerous. Accordingly to Frank J. Landy, President, of the Society of Industrial and Organization Psychology, "the term 'substantial' is considerably more demanding than the prevailing standard. . . ." May 4, 1990 letter. Ronald C. Pilenzo, President of the Society for Human Resource Management wrote to Chairman Kennedy, "this section, purportedly written to restore the *Griggs* job-relatedness standard, clearly exceeds it with new words such as 'substantial,', 'effective' and 'job *performance*'. . . . [I]t has been claimed that this new . . . language solves the quota-causing nature of that which preceded it, but here again we must take issue. We do so because the words listed above have no operational definition . . . and removes *Griggs*-established defenses, thereby creating pressuers to avoid selection system challenges, no matter how legitimately job-related those systems may be. . . . Substantial . . . is a considerably morfe restrictive standard than the . . ." 'manifest relationship' standard of *Griggs*." May 24, 1990, letter to Senator Kennedy (emphasis in original).

Not only is the term "substantial" brand new, so is the use of the term "effective." The addition of the letter term, like the term "substantial," has the effect of increasing the employer's burden of justification beyond that under *Griggs*. What does the term "effective" job performance mean? How "effective" must job performance be to justify this branch of the new standard? Does it mean a truck driver or airline pilot should be accident-free or have no more than two accidents a year? For a salesperson, does it mean the employer merely maintains a current customer base, or add new customers? For an assembly line job, does "effective" mean producing high quality goods or a high quanitity of goods?

Ronald C. Pilenzo, President of the Society for Human Resource Management, said, "[The word] '[e]ffective' . . . leaves the clearly erroneous impression that (1) individuals can and must be divided into two groups—all those who will be effective versus all those who will not—and (2) that job performance must be split into effective versus ineffective. This not only ignores the statutory and *Griggs*-given right of employers also presumes that job performance can be split in this fashion, and leaves open the question of who defines what constitutes effective. This, too, creates the kind of uncertainty that forces quota-hiring responses to avoid litigation." May 24, 1990 letter, *supra*.

Indeed, this langauge is far too narrow in that it ties an employer's burden of justification *solely* to job performance in all cases and circumstances. Suppose a company has lost sales in one division and must close it down. It transfers employees in that division, at less pay, to more profitable divisions. Suppose these transfers fall with a disproportionate impact on a particular racial, ethnic, or gender group. In the words of *Wards Cove*, the transfers significantly serve a legitimate employer goal—ridding itself of an unprofitable segment. But how can the company prove that the transfer is related in any way, let alone "substantially and demonstrably" related, to effective job performance? The transfers would be illegal under this bill.

Further, the Supreme Court has held that the job-relatedness standard of *Griggs* is met when a written test is related to performance at a concededly useful police training course. *Washington* v. *Davis*, 426 U.S. 229 (1976). The Court said, the *Griggs* standard is met when a written test "was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the [test], wholly aside from its possible relationship to actual performance as a police officer." *Id.* at 250. The Court expressly stated that this result is consistent with *Griggs* v. *Duke Power* and *Albemarle Paper Co.* v. *Moody*. *Id.* at 250, 251. See *Spurlock* v. *United Airlines*, 475 F.2d. 216 (10th Cir., 1972). S. 2104 would strike down this decision as well.

This new formulation effectively eliminates an employer's ability to use traditional job standards, such as experience requirements, personnel reports, and supervisory evaluations. How can they meet a requirement that they bear a "substantial and demonstrable relationship to effective job performance?"

As Justice O'Connor has said, "Some qualities—for example, common sense, good judgment, originality, ambition, loyalty, and tact—cannot be measured accurately through standardized testing techniques. Moreover, success at many jobs in which such qualities are crucial cannot itself be measured directly. Opinons often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's coworkers or complex and subtle tasks like the provision of professional services or personal counseling. . . ." 108 S.Ct. at 2787.

With respect to the redefinition of "business necessity" as a whole, "The only means by which [litigation] can be avoided by the employer is [to] engage in practices which produce equal results—quotas—rather then equal opportunity." Ronald C. Pilenzo, May 24, 1990 letter, *supra.*

The Supreme Court said in *Griggs*: "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins." 401 U.S. at 436. This bill commands just such a result. S. 2104 even overturns *Griggs.*

A lengthier legal discussion is contained in Appendix A.

B. HOW SECTIONS 3 AND 4 WOULD OPERATE

1. *Generally*

Suppose 20 percent of the plumbers in the Washington, D.C. labor market are from a specific racial, ethnic, or gender group. Suppose only 10 percent of the plumbers in a large Washington plumbing company are from that group. The company's hiring requirements include graduation from a trade school course, one year of experience, an interview, and satisfactory references.

A person from the specific group is rejected for a job at the company and sues, alleging illegal disparate impact under S. 2104's provisions. All the plaintiff has to do is show that in the relevant labor market 20 percent of the plumbers are from the group, that the employer has filled its plumber jobs at only half of that percentage, and allege that all of the company's hiring criteria cause the imbalance. This is all a plaintiff needs to do to make his or her case.

At this point, the plaintiff wins. That's right, the plaintiff wins, unless the employer proves its innocence and meets a burden of persuasion either that its employment criteria did not contribute to the imbalance—an impossible task—or that the criteria are "substantially and demonstrably related to effective job performance." Not that they are "job-related," not that they "have a manifest relationship to the employment in question," as *Griggs* defined "business necessity." Nor is it the *Ward Cove* formulation, "whether the employment practice serves, in a significant way, the legitimate employment goals of the employer." The "substantial" test in S. 2104 is a virtually impossible burden to meet. No employer will be able to show that anything other than the most minimal standards bear a substantial and demonstrable relationship to effective job performance.

The bill operates in this fashion as a result of sections 3 and 4. Section 4 permits a complaining party to "demonstrate that a group of employment practices results in a disparate impact on the basis of race" or other listed characteristic. (Section 4; subsection (k)(1)(B). A "group of employment practices," in turn, means "a combination of employment practices that produce one or more employment decisions." (Section 3; (n)). At this point, section 4 says that the plaintiff wins, unless the employer can prove its innocence. The employer must meet a burden of persuasion that a particular employment practice or practices do not contribute to the disparate impact or that they bear a substantial and demonstrable relationship to effective job performance. (Section 4; subsection (k)(1)(B) and (B)(ii); "the term 'demonstrates' means meets the burdens of production and persuasion" (Section 3; (m)); the term "required by business necessity" means "that the challenged practice or group of practices bears a substantial and demonstrable relationship to effective job performance" Section (3); (o) as altered by the Kennedy-Danforth language).

Merely allowing a showing of imbalance to constitute a violation of Title VII, and then forcing the employer to prove an affirmative defense, makes racial and gender balance for groups, rather equal opportunity for individuals, the touchstone of title VII. It is an effective repeal of Section 703(j) of title VII, which says that more racial or gender imbalance alone is not illegal.

In this hypothetical, many nondiscriminatory factors could have caused the imbalance. The minority community might live some distance from the employer, which might be located, say in Georgetown, and the company's location may be poorly served by mass transit. This employer may have an older, more stable workforce, with few openings, and the minority plumbers may be recent additions to the job market. But for an employer to prove this will be an astronomically burdensome and costly undertaking. Indeed, under S. 2104, these explanations are not even defenses because they have nothing to do with "effective job performance." Yet, in the real world, in the marketplace, far removed from the rigid quota theories underlying S. 2104, such factors obviously contribute to these disparities. That is one reason why requiring the plaintiff to identify the specific practice or practices allegedly causing the imbalance is fair and appropriate.

Of course, seeking to prove "substantiality" will be extraordinarily costly and almost always futile, except with respect to the most minimal standards.

It must be kept in mind that the Supreme Court has ruled that the disparate impact theory is applicable not only to objective employment criteria, such as tests and height and weight requirements, but to subjective employment criteria as well. These include supervisory evaluations, annual reviews, supervisor recommendations. These are not susceptible to scientific certainty, but they are useful, reasonable means employers use to promote and reward employees.

In the plumber hypothetical mentioned earlier, the percentage of minority plumbers in one company was compared to the percentage of minority plumbers in the relevant labor market. Obviously, a key issue will be determining that is the relevant labor market. Under the standards of this bill, a plaintiff may successfully argue that someone who only has had a little training or a little experience might be minimally able to do entry level work at the company, or pick up what he or she needs to know with on-the-job experience, even without a plumbing license. Thus, the relevant labor market would be larger than that consisting of licensed plumbers. The fact that the employer matched the percentage of licensed minority plumbers in the surrounding labor market would become irrelevant, and the company would have to justify the whole licensing process.

2. Quotas are inevitable

Under this bill, if an employer has a job which is not filled according to a quota for every group in the community, it faces almost certain liability. It will have to defend itself under S. 2104's framework—a framework under which it has virtually no chance to win. Knowing this, employers will hire and promote on a quota basis in order to avoid such liability in the future. In so doing, however, they will expose themselves to liability for reverse discrimination.

The Committee Report's assertion that employers did not resort to quotas after *Griggs*, even if true, is completely irrelevant. S. 2104 does not restore *Griggs;* it goes well beyond it, to the point of over turning it. Our concern is what will heppen under S. 2104.

In *Watson* v. *Fort Worth Bank and Trust*, 108 S.Ct. 2777, decided in 1988, Justice O'Connor warned us about the real risk of imposing quotas on the American people if the Title VII disparate impact theory is misued. In that case, the Supreme Court actually *extended* the application of the disparate impact theory to subjective employment practices, a great victory for civil rights plaintiffs. She then went on to say:

> We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. . . . It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are *not* required to avoid 'disparate impact' as such; [citing a specific provision of Title VII (Section 703(j)] Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, . . . and it has long been recognized that legal rules leaving any class of employers with "little choice" but to adopt such measures would be "far from the intent of Title VII. . . ." *Watson*, 108 S.Ct. at 2787–88 (quoting Justice Blackmun in *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 449) [citations omitted, emphasis in original].

Thus, Justice O'Connor acknowledged that:

> Extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent and it should not be the effect of our decision today. *Id.* at 2788.

> We recognize, however, that today's extension of [the disparate impact] theory into the context of subjective selection practices could increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment. Because Congress has so clearly and emphatically expressed its intent that Title VII not lead to this result, 42 U.S.C. Section 2000e–2(j), we think it imperative to explain in some detail why the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized. *Id.* at 2788.

And then Justice O'Connor, in her four-member plurality opinion, laid out the standards for proving a disparate impact case. (1) a plaintiff must identify the specific practice or practices it is challenging that is causing the imbalance; (2) the plaintiff retains the ultimate burden of persuasion, i.e., prove that discrimination has occurred—the employer does not to have to prove its innocence; and (3) citing *Griggs* and the Court's 1979 *Beazer* decision, business necessity means "any given requirement must significantly serve legitimate employer goals."

These are the very same standards reaffirmed by a majority of the Court, with the addition of Justice Kennedy, in *Wards Cove,* and they are consistent with *Griggs.* If S. 2104 is enacted, the careful evidentiary standards set forth in *Watson* and *Wards Cove* aimed at avoiding imposition of quota hiring and promotion in this country will be overturned. This will lead to the very result Justice O'Connor so eloquently warned against in *Watson* and repeated by Justice White in *Wards Cove.*

3. "Substantial" standard is only part of the problem

Each component of the provisions in Sections 3 and 4, which overturns *Wards Cove* and *Griggs.* contributes substantially to the problems identified. The burden of production versus the burden of persuasion is not just arcane and technical legal talk. Under S. 2104, if the burden of persuasion is shifted to employer to make out what amounts to an affirmative defense upon a mere showing of imbalance, Title VII is irrevocably changed. Title VII will become a statute which makes racial, ethnic, and gender imbalance alone illegal. This is so even if the other offending parts of Sections 3 and 4 were deleted. Even if we deleted the brand new "substantiality" definition of "business necessity" and the right to allege an entire hiring or promotion process is illegal based on mere numbers alone, and retained long-standing current law on these two points, this switch in the burden of persuasion would be profound.

In contrast to S. 2104, the current disparate impact test under title VII does not make illegal mere racial or gender imbalance. Section 703(j); 42 U.S.C. 2000e–2(j). Title VII makes illegal disparate impact caused by identified employer practices which are shown not to be manifestly related to the employment in question, and not significantly serving a legitimate employer goal. That is a crucial difference. That is why the plaintiff properly has the burden of proving the imbalance is caused by particular practices and that those practices are not job-related.

As Professor Kingsley R. Browne, Associate Professor of Law at Wayne State University, in his testimony before the Committee:

> Fundamentally, the question of whether the burden that shifts is one of persuasion or one of production depends upon what constitutes the "wrong" in a disparate-impact case. If the wrong is . . . that an employer has a work force that is 'out of balance,' then arguably it makes sense to say that an employer may attempt to prove the "affirmative defense" of 'business necessity.' The affirmative defense is simply an act of grace by Congress. However, if the wrong is the placement of arbitrary barriers (that is, barriers that are not job related) in the way of minority advancement, as *Griggs* held, then showing that the barrier is in fact arbitrary is part of the plaintiff's case. Of course, the plaintiff's presentation is facilitated by the employer's obligation to come forward with evidence of justification, so that the plaintiff need not preemptively rebut all conceivable justifications.

In short, there is no need to legislate on the subject of the disparate impact standard. The *Griggs* standard remains the law today. Height and weight requirements and other neutral devices which fall with a requirements and other neutral devices which fall with a disparate impact on a particular racial, ethnic, or gender group are still subject to successful challenge. Under S. 2104, they can never be upheld unless they are the minimum requirements for a job.

C. SPECIFIC EXAMPLES OF REASONABLE STANDARDS WHICH WILL BE STRUCK DOWN

1. Health and safety

This bill will overturn numerous reasonable, job-related employment standards, including those related to health and safety.

In *Spurlock* v. *United Airlines*, 475 F.2d 216 (10th Cir., 1972), a black plaintiff applied for a flight officer position. The airline required, among other things, 500 hours of flight time, a commercial pilot's license and instrument rating, and a college degree. The plaintiff only had 204 hours of flight time and two years of college, principally in music education. Since only 9 of the airline's 5,900 flight officers were black, the court found a prima facie case of disparate impact. The court ruled, however, that these job requirements are "job-related," and thus, they withstand scrutiny. The court found the 500 hour requirement reasonable to ensure success of applicants in the airline's training program.

The Court said:

> The evidence also showed that because of the high cost of the training program, it is important to United that those who begin its training program eventually become flight officers. This is an example of business necessity. We conclude that the evidence amply supports a finding that the requirement of 500 hours flight time is job-related.
>
> With regard to the college degree requirement, United officials testified that it was a requirement which could be

> waived if the applicant's other qualifications were superior, especially if he had a lot of high quality flight time, that is, flight time in high speed jet aircraft. The evidence showed that United flight officers go through a rigorous training course upon being hired and then are required to attend intensive refresher courses at six-month intervals to insure that all flight officers remain at peak performance ability. United officials testified that the possession of a college degree indicated that the applicant had the ability to understand and retain concepts and information given in the atmosphere of a classroom or training program. Thus a person with a college degree, particularly one in the "hard" sciences, is more able to cope with the initial training program and the unending series of refresher courses than a person without a college degree. We think United met the burden of showing that its requirement of a college degree was sufficiently job-related to make it a lawful pre-employment standard. *Spurlock* v. *United Airlines Inc.*, 475 F.2d at 219 (emphasis supplied).

Note again, the court treated "business necessity" as meaning "job-related," not the virtually impossible S. 2104 standard of "bearing a substantial and demonstrable relationship to effective job performance."

Can the airline meet a burden of persuasion that these two requirements are "substantially and demonstrably related to effective job performance?" It would seem not. The airline provided the statistics for 1,300 trainees during a 26-month period. While persons with 201 to 500 hours of flight time failed the training course at 14 percent rate, those with 200 or less hours failed at only a 9 percent rate. The 500 hour requirement could not withstand S. 2104's onerous burden of justification. Somebody with 200 hours could claim he or she is minimally qualified and that the failure rate of people with his or her experience is less than the failure rate of those in the next level of experience, those with 500 hours. Yet, on which airplane would one want to fly—one piloted by a person with 500 hours of prior experience, or 200 hours of such experience?

Moreover, suppose the airline later decided it only wants to hire persons with 1,501 or more hours of flight time, where its trainees only have a 2 percent failure rate? Obviously, having used a 500 hour requirement at one time, a 1,501 hour requirement is hardly "substantially and demonstrably related to effective job performance," but is manifestly related to the employment in question. Thus, it would survive under *Griggs* and *Wards Cove*, but it would fall under S. 2104.

S. 2104 does not provide a lawful way of raising standards if to do so cause disparate impact.

As far as the college degree requirement is concerned, how can it meet S. 2104's test if the employer itself waives it on occasion? Moreover, this requirement is tied to ability to complete training courses rather than job performance itself.

2. Merit based criteria

Suppose a law firm insisted on hiring only persons who have passed the Bar examination. If members of a particular racial, ethnic or gender group failed the examination disproportionately, can a law firm prove that passing the Bar examination is substantially and demonstrably related to effective performance as a lawyer in the fields of tax, corporate, real estate, trust and estates, or any other type of legal practice that does not require courtroom performance?

Suppose a law firm hiring third year law students as entry level associates only hired those students who were members of the law review. Suppose further, that the "law review" requirement falls with a disproportionate impact on a particular racial, ethnic, or gender group. Such a requirement is hardly "substantially and demonstrably related" to being an effective lawyer—most law students do not serve a law review and become fine lawyers. Yet, in the private sector, many law firms use membership on the Law Review to screen applicants from law school. It is reasonable for a law firm looking for top candidates to rely on performance in law school and achievements such as Law Review membership as a screening device. But, if this hiring criterion falls with a disparate racial, ethnic, or gender impact, Law Review membership will not be a legal hiring criterion under S. 2104.

3. S. 2104's impact on no-drug rules

This bill, even as amended in Committee, also constricts an employer's ability to ban drug users in the workplace.

In *New York Transit Authority* v. *Beazer*, 440 U.S. 568 (1979), the Supreme Court explained the disparate impact theory in almost exactly the same way as it did in *Wards Cove*—10 years before *Wards Cove* was decided. In *Beazer*, the New York Transit Authority (TA) had a general policy against employing persons who use narcotic drugs, including methadone. This was a blanket exclusion and included both safety-related jobs and job not related to safety.

Plaintiffs challenged the TA's blanket exclusion of all former heroin addicts receiving methadone treatment, asserting that the policy had a disproportionate impact on blacks and Hispanics.

The trial court struck down the TA's blanket anti-drug rule under Title VII, noting that substantial numbers of methadone users are as employable as anyone else and that normal screening procedures would basically screen out the unqualified. Thus, while permitting the TA to maintain its rule for specific categories of safety-sensitive positions, the trial court said a blanket rule must fail because a public employer "cannot bar persons from employment on the basis of criteria which have no rational relation to the demands of the jobs to be performed," i.e., the less safety sensitive jobs. *Beazer*, 440 U.S. at 578 (1979). The Supreme Court reversed.

The Court said that a no-drug rule as applied to methadone users in non-safety sensitive jobs significantly serves, but is not required by, the needs of safety and efficiency. Such a no-drug rule, as applied to non-safety sensitive jobs, however would fall under S. 2104 which overturns decisions like *Beazer*.

Senator Hatch offered an amendment in Committee which stated that, nothwithstanding any other provision of Title VII, an employer's rule barring employment of persons using an illegal drug "shall be considered an unlawful employment practice only if such rule is adopted or applied with an intent to discriminate because of the race, color, religion, sex, or national origin of such individual." As Senator Hatch explained, this amendment eliminated entirely the use of the disparate impact standard in challenges to no-drug rules. So important is safety in the workplace, that anti-drug rules should not be subject to the disparate impact standard at all.

The Committee accepted a Kennedy second degree amendment to the Hatch amendment. The only change it made was to exclude from the amendment users of illegal drugs under the supervision of a health care professional or others whose use is authorized by law. In other words, the Committee majority agreed to *eliminate altogether* the use of the disparate impact under Title VII with respect to no-drug rules as applied to some, but not all, users of illegal drugs.

This second degree amendment is a step in the right direction as to this bill's harsh impact on no-drug rules and a concession as to the extreme overreach of this bill. But, there are two significant points about the Kennedy amendment:

First, it still overturns the precise result in *Beazer*, which had upheld a no-drug rule as applied to persons in a methadone program under medical supervision. An employer, without intending to discriminate, should have the authority to bar from *any* job drug users it believes present an unacceptable safety risk, even if the drug users are under medical supervision, without being subject to a challenge that such a rule falls with a disproportionate impact on any particular group. Instead, as applied to users of illegal drugs under medical supervision or authorized by law to use the illegal drug, the impossible disparate impact standard of Sections 3 and 4 of the bill apply under the Kennedy second degree amendment.

Second, the amendment acknowledges that, at least in the areas of health and safety, the rigid, unrealistic disparate impact standard of S. 2104 is unacceptable. But drug use is not the only thing that bears on safety and health. If an airline pilot or truck driver lacks sufficient experience, that can be just as unsafe as someone using drugs. See e.g., *Chrisner* v. *Complete Auto Transit, Inc.*, 645 F.2d 1251 (6th Cir. 1981) and *Spurlock* v. *United Airlines*, 475 F.2d 216 (10th Cir. 1972). Yet, the Committee rejected a Hatch amemdment which would retain the reasonable disparate impact standard of *Griggs* and *Wards Cove* when applied to any employment rule, standard, or criteria "significantly related to the health or safety of employees, consumers, patients, patrons, travelers, students" or others affected by the employer's business.

This latter amendment, unlike the Kennedy second degree amendment pertaining to drugs and accepted by the Committee, does not even eliminate challenges under the disparate impact standard to these other health and safety requirements, such as experience requirements. It just preserves the *Wards Cove* and *Griggs* analyses to such challenges. That is, it applies a reasonable disparate impact standard to employment rules significantly related to health and safety.

If the Committee can accept the elimination of the disparate impact standard altogether when it comes to some drug users, we do not understand why this amendment, which relates to other rules involving health and safety and does not eliminate the disparate impact standard but only applies it reasonably, should be unacceptable.

Moreover, if no-drug rules and other health and safety concerns are worthy of being evaluated under a reasonable disparate impact standard, why should the desire for efficiency and productivity be treated with any less regard? That is why the *Griggs* standard of job-relatedness, and manifest relationship to the employment in question, and the *Wards Cove* formulation that these job standards significantly serve legitimate employer goals are appropriate across the board—not just for no-drug rules and other health and safety concerns.

4. S. 2104 resurrects the discredited "comparable worth" theory of compensation discrimination

Title VII bans racial, ethnic, religious, and gender discrimination in compensation. There are ample tools available under Title VII, e.g. *County of Washington* v. *Gunther*, 452 U.S. 161 (1981), and the Equal Pay Act, 29 U.S.C. 206(d), to prove such discrimination when it occurs.

In the 1970s and 1980s, however, some plaintiffs attempted to use the "comparable worth" theory to prove that employers were discriminating against women and minorities in compensation. The "comparable worth" theory basically says that "sex based wage discrimination exists if employees in job classifications filled primarily by women are paid less than employees in [entirely different] job classifications filled primarily by men, if the jobs are of equal value to the employer . . ." as determined on some subjective basis, such as a job evaluation study. *AFSCME* v. *State of Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985). The comparable worth theory rests on the assertion that an employer's whole set of compensation practices, including reliance on marketplace factors, causes a disparate impact on the compensation of women and minorities.

The Supreme Court has never adopted this theory of compensation discrimination, see *County of Washington* v. *Gunther*, 452 U.S. 161, 166 (1981), and it has been thoroughly discredited by numerous economists and rejected by many lower courts. E.g. *AFSCME* v. *State of Washington*, 770 F.2d 1401 (9th Cir. 1985); *American Nurses Association* v. *State of Illinois*, 783 F.2d 716 (7th Cir. 1986).

The repudiation is based in part on two obvious factors. First, one simply cannot measure the "inherent" worth of any job. Second, statistical analyses show that there are many measurable nondiscriminatory factors that explain significant portions of the pay gap between holders of two different jobs. Remaining portions of pay gaps in these statistical studies are unexplainable because no such study can measure all of the nondiscriminatory factors explaining such a gap. Indeed, by the late 1980s, as a Title VII discrimination theory, comparable worth had been discredited.

S. 2104, however, breathes new life into this theory. It does so by allowing plaintiffs to allege that an employer's entire set of compensation practices causes disparate impact between two groups in pay. The employer is then forced to defend every element of its pay-setting practices, with reliance on the marketplace unavailable as an explanation.

Here is what then-Judge Kennedy said in the well-known *AFSCME* v. *State of Washington* decision:

> AFSCME's disparate impact argument is based on the contention that the State of Washington's practice of taking prevailing market rates into account in setting wages has an adverse impact on women, who, historically, have received lower wages than men in the labor market. Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process . . . . The instant case does not involve an employment practice that yields to disparate impact analysis. As we noted in an earlier case, the decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessement of a number of complex factors not easily ascertainable, an assessment too multifacted to be appropriate for disparate impact analysis. *Spaulding,* 740 F.2d at 708. In the case before us, the compensation system in question resulted from surveys, agency hearings, administrative recommendations, budget proposals, executive actions, and legislative enactments. A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by *Dothard* and *Griggs;* such a compensation system, the result of a complex of market forces, does not constitute a single practice that suffices to support a claim under disparate impact theory. *AFSCME* v. *State of Washington,* 770 F.2d at 1405–06.

Under S. 2104, not only are wide-ranging challenges to general compensation policies invited, reliance on the marketplace in setting compensation is not a defense. Suppose an employer pays persons in a predominantly male job more than it pays those in a predominantly female job which is purportedly equal or comparable to the "male" job according to a subjective job evaluation study. Suppose that the employer asserts that the different pay for the two different jobs reflects what the marketplace pays for persons in those two different jobs. Thus, in *Wards Cove's* language, paying that market-based compensation to attract the most competent employees "significantly serves a legitimate employer goal."

Under S. 2104, that explanation in response to a compensation discrimination claim would be unsatisfactory. While pay levels may be important to the goal of attracting competent persons to jobs, obviously, it is not related at all, let alone substantially and demonstrably so, to *effective job performance.* Pay levels, in this case, have little to do with job performance, but everything to do with attracting employees to the job.

Congress has repeatedly refused to adopt a bill requiring a "comparable worth" *study* for the federal workforce. S. 2104 will lead to the *implementation* of comparable worth for private employers, and local, state, and federal employers.

III. SECTION 6 DENIES SOME AMERICANS THEIR RIGHST TO A DAY IN COURT TO ASSERT CLAIMS TO EQUAL PROTECTION OF THE LAWS

INTRODUCTION

Martin v. *Wilks*, 109 S. Ct. 2180 (1989), held that every American is entitled to his or her day in court. As the Supreme Court said, "All agree that '[i]t is a principle of general application in anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" 109 S. Ct. as 2184 (citations omitted).

The Court's decision embodied a principle that is a very strong affirmation of elementary civil rights. Precluding the plaintiffs in *Martin* v. *Wilks* from challenging employment decisions based on consent decrees agreed to in a case to which they had not been parties "contravenes the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." 109 S. Ct. at 2183.

S. 2104 is at war with this "deep-rooted historic tradition." It provides, in Section 6, that a person who is neither a party to a case nor has been joined as a party to a case under the Federal Rules of Civil Procedure is effectively precluded from challenging a litigated judgment or a settlement entered as a consent decree in the case, if the litigated judgment or consent decree later operates to deny that person the equal protection of the laws or the right to be free of illegal discrimination.

The principles enunciated in *Martin* v. *Wilks* are elementary. They would not have elicited objections but for the fact that their application protects the rights of innocent nonparties to challenge reverse discrimination embodied in consent decrees and litigated judgments.

A Hatch amendment, which would have allowed nonparties to challenge a consent decree or litigated order based on the ground that it violates the person's right to equal protection of the laws or to be free of individious discrimination under Federal civil rights laws, was rejected by the committee, 5–11.

A. THE BASIC SCENARIO

Suppose you are an employee at a fire department (or any other public or private employer). Assume that your employer is being sued under Title VII by members of a particular racial, ethnic, or gender group, seeking large back-pay awards and "numerical" relief, whether labeled goals or quotas, in future hiring and promotion. You don't know how hard the employer will resist the lawsuit or for how long. You don't know whether the case will be settled. You don't know whether the remedy in that case might harm you at some point in the future. And, if you try to intervene in the case too early, you could be denied intervenor status because you are premature and will slow down and clutter up the case.

After a few years of litigation, a consent decree suddenly becomes public. It includes "numerical" relief based on race, ethnicity, or gender. If you seek to intervene upon learning of the proposed consent decree, you can be denied intervenor-party status as untimely, like the white Birmingham fire-fighters in the Birmingham fire-fighters case giving rise to *Martin* v. *Wilks*. You have a chance to comment on the proposed remedy at a fairness hearing scheduled several weeks after the consent decree is announced, but that is a limited opportunity. It is *not* the same as being a party in the case. You have little opportunity for discovery or to prepare your arguments. You can't even appeal an adverse decision. And, of course, it would cost a good deal of money to get into the case, and you still can't be completely certain you are going to be hurt by the consent decree.

A year after the consent decree is entered, you seek a promotion. You are ranked sixth on the promotion list but are passed over for someone else ranked 85th, because of your race or gender, in order to implement the consent decree.

When would you prefer to be able to assert your fundamental right to equal protection of the laws and the right to be free of unlawful discrimination? When the loss of that right is speculative, before the consent decree is adopted, or when you are actually harmed in fact by operation of the consent decree? The Supreme Court says you should be able to assert your right when you are harmed. S. 2104 says no.

Is there any substitute for being able to bring a case claiming concrete harm? You studied hard for the promotion test. You learned various job skills, including qualification as a paramedic. You obtained a Fire Science Degree. You had a variety of experiences, including being chief of a small suburban fire department and service as a lead worker and acting officer. You placed sixth on the promotion list. But you were passed over by number 85 on the list who had none of these qualifications because of your skin color or gender in order to implement the consent decree. Isn't that a more appropriate point to have your claim heard by a court?

This is the position a witness before the committee, Birmingham, Alabama firefighter James Henson, found himself in. In *Martin* v. *Wilks*, the Supreme Court said his lawsuit challenging actions under the consent decree could proceed. Whether he prevails is a separate issue that turns on the legality of the consent decree; but he is entitled to be heard in his own lawsuit. S. 2104 would bar James Henson from having his case heard. He and others like him lose the fundamental right in court if this bill becomes law.

B. THE STAKES INVOLVED IN SECTION 6

In cases like *Martin* v. *Wilks* and others where persons are challenging employment discrimination consent decrees or litigated judgments, the claims asserted by the plaintiffs are equal protection claims and claims of discrimination in violation of federal statutes. Those claims may or may not prevail, but they are serious constitutional and statutory discrimination claims. If the consent decree or litigated judgment is lawful as it operates against a person not a party in the case which produced the decree or judgment, it will be upheld. If it is unlawful as it applies to this nonparty, then it ought to be invalidated as to him or her.

If this bill is enacted, it would be the first time in the last 25 years or more, insofar as we have been able to determine, that the Congress has narrowed access to the courts for persons alleging equal protection claims and discrimination claims on the basis of race or ethnicity. That the victims of this narrowing of access to the courts are expected—indeed, intended—to be principally white males is no reason to trample the most basic civil right of all: the right to a day in court.

C. HOW SECTION 6 OPERATES

Under this bill, an employee not a party to the case could simply read about an employment lawsuit against the employer in a newspaper article. The article mentions a proposed consent decree that would include numerical relief and that a fairness hearing would be held in six weeks. As a result of reading this article, that employee is precluded, as a practical matter, from bringing his or her own lawsuit.[3] The employee can challenge the consent decree only if this employee can show that the consent decree "was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction." (Section 6, subsection (m)(2)(c)).

Further, consider a mere applicant for a job, or someone who tells a friend he or she is thinking of applying for a job with an employer who is being sued under Title VII. If that person reads about a proposed consent decree including numerical relief and that a fairness hearing will be held in the near future, once it is entered, that person is effectively cut off from challenging that decree even if, years later, it operates to deny him or her a job or promotion. This person would have to get into the case before he or she is hired or even before he or she applies for the job to protect his or her future position if hired.[4] Is this a sensible or fair way to conduct litigation?

Under this bill, an employee who did not even receive any notice whatsoever of a pending consent decree could still be precluded from bringing his or her own subsequent lawsuit.[5]

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[3] Section 6, subsection (m)(1)(A)(i) says that the notice of the proposed decree or order can be "from any source" and must be "sufficient to apprise that person that" the consent decree or order "might affect the interests of the person . . ." Then, a person with such notice is effectively precluded from bringing a subsequent lawsuit challenging the decree or order, once it is entered. Simply reading about proposed numerical relief is enough to give notice that the relief "might" affect him or her. The holding of a mere fairness hearing in the near future satisfies the bill's minimal requirement that there be an opportunity to be heard.

[4] Section 6, subsection (m)(1)(A) applies to any "person"—not just an employee—who has notice of the proposed decree or order "from any source . . . sufficient to apprise such person that" the consent decree order "*might* affect the interests of such person. . ." A person applying for a job or a person seriously considering applying for a job "might" be affected by the consent decree. Accordingly, after reading about the proposed consent decree and pending fairness hearing in the newspaper, he or she would be effectively barred from challenging the consent decree or order if the person is later hired and then adversely affected by its operation.

[5] Subsection (m)(1)(C) of Section 6 says that no one can effectively challenge a consent decree or litigated order "if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons consistent with the constitutional requirements of due process of law."

Even with notice, all a person not a party to the case is entitled to under Section 6 is a chance to comment at a fairness hearing on the proposed consent decree or judgment. After that, whether the person appears at the fairness hearing or not, he or she is effectively precluded from bringing his or her own subsequent lawsuit.

Is appearing at a fairness hearing the same as intervenor or party status? No.

Do persons who appear at fairness hearings have the right to appeal adverse rulings? No.

Do persons who appear at fairness hearings have the full right to discovery available to the party litigants? No—there is usually little time prior to a fairness hearing.

Do they have the opportunity to contest fully the liability issues which would be the basis of the proposed consent decree? No—this is not a trial on the merits or on liability, it is a hearing on proposed relief. Liability issues can be raised but not as fully as they can be raised by a party to the case.

Do they have as much time to present their arguments and prepare their presentations as the parties who have agreed to the consent decree? No.

But after this comparatively minimal opportunity to be heard, they effectively lose their right to bring their own independent lawsuit based on the harm later resulting from the implementation of the consent decree.

If the victims of this harsh and terribly unfair scheme were expected to be largely minorities or women—as they are in fact expected to be white males—the proponents of this bill would be making the same arguments we are making in opposition to the bill. The fact that women and minorities can also be victimized by Section 6 in particular cases does not make section 6 any better.

Due process is a civil right. Anyone thinking that shutting litigants out of court is a "liberal" position because this bill is labelled "civil rights" and the plaintiffs in *Martin* v. *Wilks* are white males should reconsider that view. We are trampling civil rights in this bill, including the most fundamental civil right of all—the right to be heard.

D. LEGAL CONSIDERATIONS

Under current law, even if the individual has notice of the case and does not intervene, if he has not been joined under Federal Rule of Civil Procedure 19, he cannot be bound to the judgment or consent order entered in that case. One of the greatest justices of all time, Justice Brandeis, wrote in 1934: "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 441 (1934).

As stated by Charles Alan Wright, Arthur Miller, and A.E. Cooper, top scholars in the field, "The initial presumption that nonparties are not bound by a judgment has been stated in many cases. This presumption draws from the due process right to be heard . . . It is conceivable that some day this basic postulate may be eroded by courts that believe that one full and fair litigation of an issue is sufficient without regard to the identity of the parties. It is much better, however, to resist any such erosion." C. Wright, A. Miller, A.E. Cooper, *Federal Practice and Procedure,* section 4449, p. 415–6 (1981).

Congress should resist such erosion. Ironically, these scholars mentioned a threat from the courts.[6] In fact, the threat today comes from this bill, which is a thinly veiled effort to insulate reverse discrimination from challenge. Again from Wright, Miller, and Cooper: "Our deep-rooted historic tradition that everyone should have his own day in court draws from clear experience with the general fallibility of litigation and with the specific distortions of judgment that arise from the very identity of the parties." Id. at 417.

Indeed, the Birmingham case from which *Martin* v. *Wilks* arose may be a very good example. If minority plaintiffs bring a Title VII lawsuit, claiming huge backpay liability, it is no wonder a city may wish to compromise those claims. And, it is no loss to city officials to agree to a consent decree affording reduced financial relief to actual victims and future preferential treatment for nonvictims. The city can trade that kind of reverse discrimination for the future for less expenditure on backpay in the present. But who gets hurt? The absent employees or future employees who do not fall within the class of preferred persons.

The concern about finality of judgments is properly addressed through the mandatory joinder procedure under Federal Rules of Civil Procedure 19. After all, who is in the best position to know whether relief in a given case might impinge on nonparties? Obviously, the parties to the case themselves, not those uninvolved with the case. That is why mandatory joinder under Federal Rules of Civil Procedure 19 is the best way to balance the desire for finality of judgments and the need to assure fairness to everyone who can be harmed by the outcome in a case to which they are not a party.

In Section 6 of S. 2104, persons like the white firefighters in Birmingham are allowed to get a subsequent trial on the merits of their claim if they assert that the consent decree is "transparently invalid." In other words, someone who can show that a consent decree is transparently illegal as applied to him or her can get a trial on the merits and a remedy. But a person who can only show that he or she is the victim of mere illegaility, illegality which is real but simply not "transparent," whatever that means, is denied an opportunity to obtain a trial and get relief.

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[6] Many lower courts have resisted the erosion of this principle: "Under this claimed extension of the doctrine of collateral estoppel, a person, who knows of a suit wherever filed, involving an issues affecting him, and, though it may be that he cannot be served with process in that suit and made amenable to the jurisdiction of the Court, he, if he fails to intervene, can be precluded by the judgment in that case. Such an argument, so contrary to fundamental concepts of due process, can be justified neither in reason nor on authority and, whenever asserted, it has been consistently repudiated both in authoritative federal and state decision." *Morris* v. *Gressette*, 425 F. Supp. 331, 335 (D.C.S.C. 1976), aff'd 432 U.S. 491 (1977); *Fabricius* v. *Freeman*, 466 F. 2d 689, 693 (7th Cir. 1972) ("The fact that she could have intervened, though she did not, does not result in her being bound by that adjudication."); *Show-World Center, Inc.* v. *Walsh*, 438 F. Supp. 642 (S.D.N.Y. 1977) (tenant who could have itnervened in its landlord's proceedings to challenge an order that the building be vacated remained free to institute its own proceedings); *Alaska* v. *Andrus*, 429 F. Supp. 958, (D.C. Alaska 1977); aff'd 591 F. 2d 537 (1979) (after an environmental protection group obtained a preliminary injunction compelling the Secretary of the Interior to issue an environmental impact statement before allowing Alaska to proceed with a program to kill wolves, Alaska was free to bring its own action for a declaration that an order issued in compliance with the injunction was invalid. The State was not obliged to intervene in the first proceeding.)

Whether the illegality is transparent, slightly less than transparent, or more subtle, however, the effect on the victime is the same. He or she loses a job opportunity, a promotion, backpay, or the accumulation of seniority—all because of race, for example—if the consent decree is illegal.

Until we read this bill, we would never have believed that civil rights proponents would suggest that there can be such a thing as just a little bit of illegal discrimination. In other words, this bill protects illegality in the most important areas of the law. The illegality consists of violations of equal protection of the laws and our civil rights statutes. But that is acceptable under this bill because the expected victims of this denial of access to the courts are white males. The Supreme Court has told us, however, that persons of all races have the same protections under the equal protection clause. *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989).

The Committee Report seeks to justify the inherent unfairness of Section 6 by asserting that it is constitutional. Ironically, the Report relies on cases that do not arise in the context of claims of the denial of equal protection of the law on the basis of race, ethnicity, religion, or gender, but which buttress our criticism of Section 6.

In *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306 (1950), the Supreme Court spoke of a due process right to an "opportunity for hearing *appropriate to the nature of the case,*" in the context of a trustee's effort to settle accounts in a common trust fund. 339 U.S. at 313 (emphasis supplied).

In another case cited by the Committee Report, *Boddie* v. *Connecticut,* 401 U.S. 371 (1971), the Supreme Court said, "What the Constitution does require is 'an opportunity . . . granted at a meaningful time and in a meaningful manner' (citation omitted), *'for [a] hearing appropriate to the nature of the case.'* " citing *Mullane* "The formality and procedural requisites can vary, *depending upon the importance of the interests involved and the nature of the subsequent proceedings.*" 401 U.S. at 378 (emphasis supplied) (footnote omitted). See also *Matthews* v. *Edridge,* 424 U.S. 319, 334-335(1976) (in determining the type of hearing required, the importance of the private interest; the likelihood of erroneous deprivation of that interest; and the value of additional safeguards; and the magnitude of the governments interest, must be considered).

The "nature of the case" arising under Section 6 relates to the most personal of individual rights in our legal system—the rights to equal protection of the law and to be free of invidious discrimination. These "interests" are of the utmost "importance", to cite the terms used in *Boddie*. A minimal opportunity to be heard at a mere fairness to assert these fundamental rights and interests is inadequate. An opportunity for a day in court—to be heard in one's own lawsuit on the merits once a person is harmed—is the only hearing appropriate for such a claim. The other factor cited by *Boddie* in determining the nature of a hearing, "the nature of the subsequent proceedings," cuts heavily against Section 6: under Section 6, once a mere fairness hearing is held, as a practical matter, there are no subsequent proceedings.

A fuller exposition of these points is contained in Appendix B.

E. S. 2104 THROWS CURRENT LITIGANTS OUT OF COURT

Finally, S. 2104 is not merely content effectively to slam the door in the face of innocent third parties in the future. By applying Section 6 retroactively, this bill would literally throw current litigants asserting constitutional equal protection claims and discrimination claims right out of court and into the streets without opportunity for redress.

F. S. 2104'S DOUBLE STANDARDS

1. Some persons are shut out of court but not others

Suppose the EEOC or the Department of Justice were to bring a Title VII suit against an employer alleging racial discrimination against minority employees in promotions. These employees are not parties to the case, but all have notice of the case and know that their interests are at stake. They could initiate their own lawsuits or intervene in the government's case. They choose not to do so. Meanwhile, other employees, including white males and women, are watching the lawsuit. The federal government and employer then propose a consent decree with notice of a fairness hearing. The consent decree provides for promotions and backpay for some, but not all, of the minority employees. It also provides for numerical "goals" for future promotion. The consent decree is then entered by the Court. Two months later, one of the minority employees seeks to sue the employer because he or she did not get a promotion or backpay under the consent decree. On the same day, a white male decides to sue, claiming he was denied a promotion in favor of a less qualified person because of his race as a result of the consent decree's numerical provisions. He can show the consent decree is illegal as applied to him but not that it is transparently so. Which lawsuit is permitted to proceed under Section 6?

As is possible under current law, S. 2104 allows the minority plaintiff to seek relief, notwithstanding the consent decree.[7] See, e.g., *General Telephone Co.* v. *EEOC.*, 446 U.S.C. 318, 332–333 (1980); *Eirhart* v. *Libbey-Owens Ford Co.*, 616 F.2d 278, 282–283 (7th Cir. 1980); cert. denied 449 U.S. 829 (1980); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40, 65–66, (5th cir. 1974) rev'd on other grounds, 431 U.S. 395 (1977); *Williamson* v. *Bethlehem Steel Corp.*, 468 F. 2d 1201, 1203, 1204 (2nd Cir. 1972), cert. denied, 411 U.S. 931 (1973); Wright, Miller, and Cooper, supra, at 515.

S. 2104, however, slams the courthouse door in the face of other innocent employees, in this instance, the white male. This overturns current case law, namely *Martin* v. *Wilks.* Yet, the minority employee had the exact same notice and "opportunity" to be heard concerning the consent decree as the white employee. The consent decree has harmed the white employee. Yet the minority employee can seek relief for employment discrimination notwithstanding the consent decree, but the white employee cannot.

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[7] Section 6 (m)(2)(B) states that the provisions of Section 6 do not "apply to the rights . . . of members of a group on whose behalf relief was sought in such action by the federal government . . ."

In our view, both employees should have their day in court; these cases involve a great deal more than who gets a bankrupt company's widgets or assets from a common trust fund. This involves equal protection of the laws and freedom from racial discrimination—the most personal of rights.

As mentioned earlier, the Supreme Court has given both employees the right to their own full day in court. This equal right to assert claims of denial of equal protection of the laws and invidious discrimination, however, is stripped away by this bill. The innocent nonparty harmed by the consent decree is shut out—in the name of civil rights.

2. S. 2104 protects victims of discriminatory seniority provisions, but not victims of discriminatory consent decrees

There is some irony in Section 6. Other parts of S. 2104 overturn the *Lorance* v. *AT&T Technologies Inc.,* 109 S.Ct. 2261 (1989) decision. There the Supreme Court held that a facially neutral seniority provision adopted for the purpose of discrimination against women must be challenged within a certain time from the adoption of the seniority provision. This bill, instead, permits persons like the women in *Lorance* to sue an employer at the time they are harmed in fact by such a seniority provision, even though they were represented in the collective bargaining which produced the seniority provision. We agree with that, and the bill we have introduced, S. 2166, reverses that decision. But why not let every American have his or her right to a day in court at the time the individual is actually harmed, be they white, black, Hispanic, Asian, male or female?

3. Section 6 singles out only certain kinds of civil cases

The *Martin* v. *Wilks* decision, while arising in the context of an employment discrimination case, is of general application. Yet, Section 6 does not overturn it with respect to all civil cases. Section 6 selects the most important claims that can be made in our civil justice system—equal protection and civil rights claims—and restricts access to the courts to assert them.

G. RESPONSES TO CLAIMS OF PROPONENTS

1. S. 2104's proponents claim a need for finality

Proponents of this legislation claim that the need for finality compels denial of the right of innocent nonparties to challenge, in their own lawsuits, consent derees depriving them of their right to equal protection of the law and the right to be free of illegal discrimination.

As we have seen, of course, proponents of S. 2104 are only seeking greater finality with respect to some persons, not others. Those adversely affected by civil rights consent decrees are to be effectively barred from subsequent challenges; those on whose behalf such decrees are entered in government litigation are allowed to challenge the decrees in order to seek greater relief for themselves.

The surest ways to avoid a subsequent challenge to a consent decree by a nonparty are (1) to refrain from including discriminatory provisions in the consent decree in the first place, or (2) mandatorily join necessary nonparties to the case itself. With respect to the first point, it is precisely the reverse discrimination embodied in some employment consent decrees that proponents of S. 2104 seek to insulate from effective challenge.

2. S. 2104's proponents claim section 6 is truly neutral, stripping away the right to a day in court on an equal basis

Some proponents of this bill claim that the bill's overturn of *Martin* v. *Wilks* does not single out one group, but is facially neutral. But apply the disparate impact theory to Section 6.

On whose behalf are the overwhelming majority of Title VII suits brought? Racial and ethnic minorities and women. Who, then, stands to lose from numerical relief in favor of these groups? White males. Like the neutral device of a height or weight requirement, Section 6 has a clearly identifiable disparate impact. Its effect is to insulate from challenge reverse discrimination embodied in court settlements.

In an effort to end discrimination, the proponents would by statute engage in the very type of discrimination all of us find so repugnant. What is odd, however, is that Section 6 is so poorly conceived that it would also harm members of groups the proponents wish to protect. We have an increasingly multicultural workforce. It is likely there will be some instances where Section 6 will also harm minorities or women. Suppose a consent decree in favor of women operates to harm male minorities. Section 6 would effectively preclude the right of those minorities to challenge the consent decree if it operates to harm them. Is this a policy which the majority really wants to make the law of the land?

Several years ago, the New Orleans Police Department entered into a 50–50 black/white racial quota for employment in all ranks. Three separate groups of police officers intervened to object—a group of whites, a group of Hispanics, and a group of women. Had they not intervened, the principle of *Martin* v. *Wilks* would preserve their right to sue when harmed by the consent decree. S. 2104 is certainly no less objectionable because it would effectively strip all three groups of such a right, rather than just one group.

3. S. 2104's proponents claim Martin v. Wilkins discourages settlements

Some argue that this decision will discourage settlement of civil rights litigation. On the contrary, it will merely serve to impose some discipline on litigants to reach agreements that don't trample the rights of third parties or to, at least, join them mandatorily as parties. Plus, why would this decision discourage a settlement? The parties know that if they don't settle, the court will rule and impose a judgment on them. That concern is a major factor leading to settlements. Moreover, the settlement or judgment is equally subject to subsequent attack by a person who was not even an employee at the time and had no notice of the original lawsuit.

4. Martin v. Wilks will waste judicial resources

It is also argued that the same issues will be relitigated over and over again and waste judicial resources. The Supreme Court responded to this concern:

> Even if we were wholly persuaded by these arguments as a matter of policy, acceptance of them would require a rewriting rather than an interpretation of the relevant Rules. But we are not persuaded that their acceptance would lead to a more statisfactory method of handling cases like this one. It must be remembered that the alternatives are a duty to intervene based on knowledge, on the one hand, and some form of joinder, as the Rules presently provide, on the other. No one can seriously contend that an employer might successfully defend against a Title VII claim by one group of employees on the ground that its actions were required by an earlier decree entered in a suit brought against it by another, if the later group did not have adequate notice or knowledge of the earlier suit.
>
> The difficulties petitioners foresee in identifying those who could be adversely affected by a decree granting broad remedial relief are undoubtedly present, *but they arise from the nature of the relief sought* and not because of any choice between mandatory intervention and joinder. Rule 19's provisions for joining interested parties are designed to accommodate the sort of complexities that may arise from a decree affecting numerous people in various ways. We doubt that a mandatory intervention rule would be any less awkward. As mentioned, plaintiffs who seek the aid of the courts to alter existing employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating those who would be adversely affected if plaintiffs prevail; these parties will generally have a better understanding of the scope of likely relief than employees who are not named but might be affected. Petitioners' alternative [requiring third parties to intervene in a close or lose their right to litigate their claims] does not eliminate the need for, or difficulty of, identifying persons who, because of their interests, should be included in a lawsuit. It merely shifts the responsibility to less able shoulders.
>
> Nor do we think that the system of joinder called for by the rules is likely to produce more relitigation of issues than the converse rule. The breadth of a lawsuit and concomitant relief may be at least partially shaped in advance through Rule 19 to avoid needless clashes with future litigation. And even under a regime of mandatory intervention, parties who did not have adequate knowledge of the suit would relitigate issues. Additional questions about the adequacy and timeliness of knowledge would inevitably crop up. We think that the system of joinder presently contemplated by the Rules best serves the many interests involved in the run of litigated cases, including cases like the present one. 109 S.Ct. at 2187, [emphasis supplied].

Of course, S. 2104 does not even require that a nonparty have an opportunity to intervene as a party before it strips the nonparty of its right to a day in court. S. 2104 only requires that the nonparty have the minimal opportunity of appearing at a mere fairness hearing.

The *Martin* v. *Wilks* decision is well-rooted in Anglo-American jurisprudence and prior Supreme Court decisions. This is a matter of constitutional due process, not merely a matter of statute and changing the rules of civil procedure. The Court said so in 1940, in an opinion by Justice Stone, joined by Justices Black, Frankfurter, Douglas, and Chief Justice Hughes: "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require." *Hansberry* v. *Lee,* 311 U.S. 32, 40 (1940) [citations omitted]. In 1979 the Court said, in an opinion joined by, among others, Justices Brennan, Marshall, Blackmun, Powell, and Stevens: "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 327 n.7.

5. Proponents claim bankruptcy and probate statutes bar successive litigation by nonparties: Shouldn't title VII do so?

No. The Supreme Court in *Martin* v. *Wilks* noted that "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights *if the scheme is otherwise consistent with due process.*" 109 S.Ct. 2184, n.2 [emphasis added].

Equating employment discrimination claims with bankruptcy or probate procedings, as proponents of this bill do, is simply wrong. We do not equate a creditor's claim that it is entitled to a bankrupt company's widgets with a claim by someone—black, Hispanic, Asian, white, Jewish, Catholic, male or female—that he or she is being denied equal protection of the laws. These latter claims asserting the most personal of rights deserve more respect and more process. As some of our witnesses pointed out, the Supreme Court has noted that what process is due depends, in part, on what rights are at stake. See, e.g., *Matthews* v. *Eldrige,* 424 U.S. 319, 334–335 (1976) (in determining the type of hearing required, the importance of the private interest; the likelihood of erroneous deprivation of that interest, and the value of additional safeguards; and the magnitude of the government's interest, must be considered.)

It is strange to observe the proponents of this bill assert that the rights protected by the equal protection clause and civil rights statutes deserve no more process and protection than a claimant in a bankruptcy or probate case.

Moreover, bankruptcy and probate proceedings are retrospective in nature. They deal with past transactions. In addition, they deal with real and personal property to which title must be determined. Employment cases affix future rights and tangibly impact the most fundamental of personal rights.

As Glen Nager, a witness and former assistant to the Solicitor General testified:

> In the case of [bankruptcy and probate statutes], the private interest at stake, the likelihood of error, and the magnitude of the governmental interest are fundamentally different. In those [statutes], the claims being asserted already exist, and the government is requiring that they be filed in order to ensure the termination of a legal entity; provided that it satisfies the constitutional requirements of notice and opportunity for hearing, the government may legitimately seek to terminate claims that have been filed against such expiring entities. By contrast, litigation in the employment context seeks to structure an ongoing and continuing relationship; in doing so, it implicates future (as well as past) claims, creates a much greater risk of erroneously depriving individuals of future substantive rights, and presents a much less compelling case for finality and conclusiveness. Indeed, in such circumstances, there are much more sensitive devices available for accomodating the individual's statutory right to challenge unlawful employment practices and the government's interest in promoting the prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments.
>
> Specifically, in appropriate circumstances and pursuant to proper procedures, a person may be joined in and thus become bound by litigation in which he would prefer not to participate. *See* Fed. R. Civ. P. 19; *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 107-125 (1968). Moreover, in appropriate circumstances, that joinder may be accomplished by defendant class-certification procedures. *See Henson* v. *East Lincoln Township*, 814 F.2d 410, 420 (7th Cir. 1987) (Campbell, J. concurring in part and dissenting in part), *cert. granted*, No. 87-5461 (Nov. 2, 1987); Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630, 639-647 (1978). Furthermore, even when joinder is not appropriate (because, for example, the claims of individuals are too speculative), a district court may transfer a later filed civil action to the district or division where the consent decree was originally entered, and consolidate the later action with the earlier one. *See* 28 U.S.C. 1404(a); Fed. R. Civ. P. 42; *see generally* 15 C. Wright, A. Milelr & E. Cooper, *supra* at 249-251. Finally, statutes-of-limitations and the doctrine of laches may be applied to ensure that any later actions are filed in a timely fashion; indeed, in appropriate cases, a defendant may legitimately claim that backpay is an inequitable remedy (since the action was

taken pusuant to the terms of the court order). *See Ashley v. City of Jackson,* 464 U.S. at 902 (1983).

IV. S. 2104 IS A LITIGATION BONANZA FOR LAWYERS

INTRODUCTION

Title VII is a statute aimed at conciliation, settlement, ending discrimination, and quickly putting a victim of discrimination into that person's rightful place in the workforce, with backpay and whatever other equitable relief to which he or she may be entitled. S. 2104 transforms Title VII into a statute under which conflict in the workplace will be exacerbated and protracted, with costly litigation as the weapon of first, rather than last resort. The bill achieves this transformation in several ways.

A. THE AVAILABILITY OF EXPENSIVE REMEDIES

The addition of new and costly remedies to Title VII actions would convert the remedies of the nation's basic employment discrimination law from their current "make whole" nature to the punitive approach which characterizes our tort system.

1. Unprecedented employment law remedies

By incorporating compensatory and punitive remedies into Title VII, the bill would not only dismiss a 25-year statutorily mandated practice of make-whole remedies under Title VII itself, but would break the pattern of every Federal employment law enacted since the very first comprehensive federal employment law—the National Labor Relations Act (NLRA)—enacted in 1935. Since that time, the focus of every federal employment law—including the Fair Labor Standard Act (FLSA), the Age Discrimination in Employment Act (ADEA), the Davis-Bacon Act, and the Employee Retirement Income Security Act (ERISA)—has been to eliminate discriminatory practices by restoring the injured party to the status he or she would have enjoyed had the violation not occurred and enjoining the discriminatory practices. The intent has never been to punish the employer, as is the case under this bill.

The rationale behind foregoing punitive remedies has been to focus employment laws on the promotion of a positive, lasting employment relationship, thus enabling protected workers to obtain and hold jobs free from discriminatory or other illegal treatment.

Thus, remedies available under such laws have been "equitable", commanding the employer to discontinue illegal practices while restoring the claimant to the status quo by hiring, reinstatement or promotion, together with back pay. In some limited instances, such as the Fair Labor Standards Act, an additional amount of "liquidated damages" is available, but these are limited to an amount equal to that of the back pay ordered.

Federal employment laws do *not* provide for general damage awards that are not tied to a specific economic loss. Thus, damages typical to tort law, such as "compensatory damages" ("pain and suffering," "mental anguish" and so forth) and punitive damages, are excluded. It is highly improbable that a lasting working relationship could be established in such a setting.

While Section 1981 of the Civil Rights Act of 1866 may appear at first glance to be an exception to this general approach, it is generally overlooked that such a provision was *not* enacted as an employment law. Rather, it was enacted immediately after the Civil War to ensure black citizens the freedom of contract. It was not until a century later that it was even applied in the private employment context in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 154, 460 (1975).

To use Section 1981 as a precedent for altering Title VII and other employment law remedies ignores their dissimilar origins and is in no way restorative of prior law.

2. S. 2104: A disincentive for conciliation and settlement

The entire enforcement scheme of Title VII is built around the encouragement and fostering of conciliation efforts, and should conciliation fail, settlement short of trial. Indeed, the statute mandates that the Equal Employment Opportunity Commission seek such conciliation in all cases before enforcement actions proceed any further.

In rejecting the availability of compensatory damages under the ADEA, the federal courts have spoken frequently about the potential effects those damages would have on the conciliation process. As was stated by the Third Circuit in *Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834, 841 (1977):

> While the existence of such an item of damages might strengthen the claimant's bargaining position with the employer, it would also introduce an element of uncertainty which would impair the conciliation process. Haggling over an appropriate sum could become a three-sided conflict among the employer, the [EEOC], and the claimant. The same drawbacks would apply in a court suit brought by the [EEOC] where the question of authority between [the EEOC] and the claimant to decide upon an acceptable amount would create another area of dispute.

Similarly, the Second Circuit in *Johnson* v. *Al Tech Specialties Steel Corp.*, 34 FEP Cases 861, 865 (2nd Cir. 1984) stated as follows:

> In an era of burgeoning federal caseloads, Congress's intent to resolve as many discrimination disputes as possible in agency proceedings rather than in lawsuits comports with sound principles of judicial administration. A system which would permit complainants potentially to recover considerably larger sums if they resist settlement and initiate litigation would undermine this central feature of both Title VII and the ADEA.

Moreover, even if conciliation among the parties fails, settlement short of costly, lengthy trials is fostered under the current scheme. The new Title VII remedies provided in the bill would clearly hamper settlements by nourishing hopes of a big prize at the end of a trial, thus reducing the claimant's enthusiasm for negotiation. Even where such a willingness might exist, the addition of remedies which are not subject to objective measurement adds a significant element of unpredictability to a case. As was stated in the testimony of Wayne State University Professor Kingsley Browne: "It is much more difficult to settle a case where the parties have grossly different estimates of its value."

3. The effectiveness of current remedies

Much has been heard about the alleged lack of "meaningful" remedies under Title VII for cases involving on-the-job harassment where there is no loss of income or benefits. We are prepared to consider changes in current law to address this question.

Meanwhile, critics of Title VII's harassment remedies overlook the frequent availability to the complainant of other remedies under other laws, including State tort law that *are* designed to provide monetary relief, particularly in the more egregious cases. Indeed, some cases cited by proponents of S. 2104 illustrate this point.

In *Arnold* v. *City of Seminole, Okla.*, 614 F.Supp. 853, 857 (E.D.Okl. 1985), the plaintiff not only received back pay and injunctive relief under Title VII, she also received an additional $150,000 on her claims under 42 U.S.C. 1983, Oklahoma fair employment laws, and a tort theory of intentional infliction of emotional distress.

In *Brooms* v. *Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989), the claimant was provided $60,600 in back pay under Title VII, minus an offset for her earnings during the same period. The court cited the availability of a remedy under the Illinois Workers' Compensation Act, which would cover any medical expenses under a valid claim. The jury had denied the claimant's Section 1981 racial harassment claim. Interestingly, the Seventh Circuit observed that the claimant's previous insistence of a settlement in excess of $3,000,000 "indicates that her sole motivation for proceeding to trial was to pursue her Section 1981 claim . . ." 881 F.2d at 425 n. 11.

These cases illustrate the very point of preserving Title VII's "make whole" remedies: the availability of remedies under other laws—both federal and state—that serve other purposes where those purposes come into play in a case. The fact that plaintiffs in employment discrimination cases can and do avail themselves of the myriad overlapping laws—each with its own set of significant remedies—illustrates the absence of any need to enlarge so broadly Title VII's remedies. Moreover, it illustrates the existence of a larger problem that this bill fails to address: the proliferation of a multitude of avenues for a promising several bites at the apple for plaintiffs and their lawyers.

4. Explosion of costs

The enactment of broad new Title VII remedies would impose a substantial increase on the costs of doing business in the global marketplace, not to mention the costs imposed on the taxpayer in suits against public employers.

The impact of adding compensatory and punitive damages on litigation costs was demonstrated by a RAND study of 120 wrongful discharge cases in California between 1980 and 1988, when such extraordinary damages were still available in all wrongful discharge cases in that state. Since discriminatory discharge cases make up two-thirds to three-fourths of all Title VII cases, the study provides a preview of what would likely happen with the enactment of this bill. The study found the award of compensatory and punitive damages ranged from $7,000 to $8 million. The average final award received by prevailing plaintiffs was $307,628, far beyond the average "make whole" award under the current Title VII. J. Dertouzos, E. Holland, and P. Ebener, *The Legal and Economic Consequences of Wrongful Termination* 27 (1988). Many Title VII defendants are city and state agencies—whose taxpayers will foot the bill.

Meanwhile, the dwindling of settlements coupled with the introduction of jury trials for certain Title VII cases would squeeze even further an already strained federal judiciary.

B. IN "MIXED-MOTIVE" CASES, PLAINTIFFS MAY RECOVER COMPENSATORY AND PUNITIVE DAMAGES EVEN IF THEY SUFFER NO HARM

Our legal system is generally premised upon the notion that a claimant is entitled to a remedy only to the end that there is a causal connection between the offense and the injuries experienced by that claimant. Section 5 allows a plaintiff to recover compensatory and punitive damages in a jury trial if race or other factors proscribed by Title VII are a motivating factor in an employment decision, even if the employer would have made the same decision for legitimate reasons. Such a plaintiff is not entitled to receive the job, in such a case, under Section 5.

Thus, S. 2104 is not content merely with eliminating the requirement that a plaintiff must show a causal connection between indentified, allegedly discriminatory practices and imbalance in a job in disparate impact cases (sections 3 and 4 of the bill). In Section 5, S. 2104 also removes the need for a plaintiff, in certain intentional discrimination cases, to suffer any monetary harm before collecting monetary relief. An elementary part of our legal system is that before a person can recover monetarily, the person must suffer harm caused by the defendant.

Section 5 of this bill stands that principle on its head by providing that *any* showing that discrimination played a role in an employment decision is sufficient for a plaintiff to receive compensatory and punitive damages as well as attorneys fees, even if the employer would have taken the same action(s) regardless of the discrimination.

Thus, Section 5 permits a plaintiff to recover compensatory and punitive damages, and to have a jury trial, which, in the words of Deputy Attorney General Don Ayer, "is based solely on the discriminatory thoughts of an agent or an employer, which have no consequence to the plaintiff"—that is, even though the employer hired or promoted a better qualified person for nondiscriminatory reasons.

In adopting this approach, the bill contradicts the conclusion of the U.S. Supreme Court in *Price Waterhouse* v. *Hopkins,* 109 S.Ct. 1775 (1989), in an opinion by Justice Brennan. *Price Waterhouse* held that an employer can rebut a showing that race or sex discrimination played a role in an employment decision if it can demonstrate that it would have made the same decision even if race or sex had not played a role in the decision. Every justice rejected the position in Section 5 of the bill. "And for good reason," stated Professor Kingsley Browne in testimony before this committee. "Why should an employee who would have been discharged anyway be placed in a better position simply because one of the decisionmakers harbored some discriminatory animus? Under the current bill, even if the trier of fact concludes that the plaintiff would have been discharged anyway, and therefore no causal connection between the act and the thought exists, the plaintiff is entitled to compensatory and punitive damages, as well as attorneys' fees."

A typical example of the nonsensical—and costly—results under Section 5 is a situation where 100 partners vote unanimously against offering partnership to a woman based on her qualifications. Simply by showing that a single one of those partners was motivated in part by sexual stereotypes, the bill would allow her to recover compensatory and punitive damages and attorneys' fees—even if that one partner would have voted the same way for other, legitimate reasons. As was stated in testimony by Deputy Attorney General Donald B. Ayer: "I believe that this would be the first instance ever in American law where damages could be recovered solely for thinking bad thoughts." Under Section 5, a plaintiff need not suffer the harm prohibited by the statute—employment discrimination—before recovering compensatory and punitive damages.

This latter result of Section 5 is a dramatic alteration of Title VII. As originally enacted, it was clear that Title VII only prohibited discriminatory actions, not thoughts. As Justice O'Connor observed, in response to claims that Title VII would become a "thought control bill," Senator Case stated that, "There must be some specific external act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences." 100 *Cong. Rec.* S. 7254 (1964).

Indeed, Section 5's extreme departure from current law is exemplified by the fact that not even the proponents of this bill would force the employer to hire the person in question, such as the woman in the hypothetical mentioned earlier. Why? Because it is clear that the employer did not deny the person a job because of discrimination, and preferred a better qualified person for nondiscriminatory reasons.

The net result of such a change in current law would be an increase in litigation and a reduced likelihood of settlements. Under the new rule, as long as the plaintiff had some shred of evidence of discrimination, the plaintiff and his or her attorney would be likely to want to proceed to almost certain victory in the trial with a possibility of "hitting it big" before the jury.

As James Paras testified on behalf of the Chamber of Commerce: "Businesses cannot control the thoughts of each and every employee involved in the decision-making process. The best an employer can do is to establish an employment process that, through an effective system of checks and balances, prevents decisions from being made for illegal reasons. If an employer is successful in this endeavor, it should be rewarded, not penalized by the law."

The ultimate irony regarding this provision is provided by the final outcome in the *Price Waterhouse* case itself. The case was remanded to the lower court and, on May 14, 1990—applying the Supreme Court's test—the lower court found for Hopkins, awarded her $350,000 for lost earnings, and ordered Price Waterhouse to make her a partner. If there is anything to be learned from the *Price Waterhouse* case, it is that the procedures and remedies currently available to discrimination victims under federal law are both effective and substantial.

C. SIGNIFICANT EXTENSION OF THE STATUTE OF LIMITATIONS WITHIN WHICH CLAIMS MUST BE FILED

Under current law, a discrimination claim under Title VII must be filed within 6 months of the alleged illegal occurrence. This time limitation, also applicable to charges filed under the National Labor Relations Act, carefully balances the need for claimants to have an adequate time to raise their claim and the importance of the prompt resolution of those claims.

Despite the absence of evidence that the current statute of limitations in any way prejudices or disadvantages claimants, S. 2104 makes two significant changes in this regard. First, it extends the statute of limitations from six months to two years. Second, it provides that the statute of limitations run, not just from the time of the alleged illegal occurrence—as under current law—but also from time the alleged illegal occurrence "has been applied to affect adversely the person aggrieved, whichever is later." This language overturns at least three Supreme Court decisions: *United Airlines* v. *Evans,* 431 U.S. 553 (1977); *Delaware State College* v. *Ricks,* 449 U.S. 250 (1980); and *Chardon* v. *Fernandez,* 454 U.S. 6 (1981). In another of the bill's inherent contradictions, if a consent decree is "applied to affect adversely the person aggrieved," Section 6 effectively denies such person any right to be heard, as mentioned earlier.

These two changes in the bill will unavoidably open the door to many stale claims. For example, suppose a person is laid off for intentionally discriminatory reasons in 1990, but does not bring a Title VII action within six months (or within two years, if this provision is changed, per S. 2104). Under current law, this person has foregone his or her Title VII claim. If the person is later rehired in 1995, under this bill the person can then seek the following: retroactive seniority lost due to the 1990 discrimination, two years of backpay, compensatory and punitive damages as a result of the loss of five years of seniority, and, lowered earnings, pain, and suffering since 1990.

A primary goal of Title VII is the prompt resolution of employment discrimination claims. This goal not only advances the potential for a victim to recover, as well as for reconciliation, and the reestablishment of a nondiscriminatory work relationship, but also diminishes the chance of harm to innocent coemployees, whose career and other expectations are often built on prior employment decisions. As James Paras argued in testimony before this committee on behalf of the U.S. Chamber of Commerce:

> Permitting an employee to wait for more than two years before filing a charge of discrimination is wholly inconsistent with the goal of prompt resolution of employment disputes. Moreover, it is simply unfair to permit an employee

> to wait to exercise a right while the memories of witnesses fade, documents are lost or misplaced, and back pay is accruing. An individual should not be permitted to "grow" potential back pay award while the employer goes without notice of any problem, in the workplace. If employers are given prompt notice of a problem by the early filing of a charge, they can correct it and provide reasonable compensation to any victims of discrimination. Without prompt notice, the problem may go uncorrected, and an employer's back pay liability will be increased unjustifiably. Moreover, by unnecessarily expanding an employer's back pay liability, this extended limitations period may well impede another fundamental purpose of Title VII—conciliation and settlement of cases.

In the meantime, other employees are accruing seniority and other benefits which they will have to subordinate to the relief provided to a victim of the employer's discrimination. The longer the victim waits to come forward, the more unsettling such relief will be to other employees.

D. PERMITTING RECOVERY OF PLAINTIFF'S ATTORNEY'S FEES INCURRED AFTER REJECTION OF A SETTLEMENT OFFER WHICH EXCEEDS THE PLAINTIFF'S ULTIMATE JUDGMENT

S. 2104 encourages lawyers to drag out cases by overturning a 1985 Supreme Court decision by Justice Stevens in *Marek* v. *Chesney,* 473 U.S. 1 (1985), thereby making the recovery of attorney's fees easier.

The current Title VII statute, in Section 706(k), allows the court to award the prevailing party a "reasonable attorney's fee *as part of* the costs" of his or her case. As a practical matter, under case law, courts award attorney's fees to prevailing plaintiffs but not to prevailing defendants.

S. 2104, Section 9, Subparagraphs (2) and (3), alters this language in Section 706(k). It allows the award of attorney's fees to prevailing parties, not as *part* of the costs of the case, *but in addition to the costs.*

Under current law, Federal Rule of Civil Procedure 68 allows a defendant, for instance an employer, to make a formal offer of settlement to a plaintiff. Let us say the employer offers $100,000 to settle the case. Suppose the offer is rejected. Suppose further that the plaintiff goes on to win a judgment for only $20,000. This is, of course, less than the amount of the offer the plaintiff had rejected. In that circumstance, under current law, the plaintiff cannot recover costs incurred during the period following rejection of the employer's offer. These costs include attorney's fees if the underlying statute, like Title VII, defines "costs" to include attorneys fees.

Current law is eminently reasonable. A plaintiff who obtains a lesser recovery than the amount the employer had offered has not gotten any benefit from his lawyer's efforts following the rejection of the settlement offer.

Indeed, the Supreme Court, in a decision by Justice Stevens, upheld this restraint on lawyers' fee recoveries. *Marek* v. *Chesny,* 473 U.S. 1 (1985). That case held that, when a party rejects a settlement offer, and then receives a final judgment that is no more generous than the original offer, the attorney's fees awarded to the party are limited to those incurred prior to the offer. In other words, if the party's intransigence resulted in an increase in attorney costs, that party should have to pay the price for its own error in judgment. The Court reasoned that disallowing recovery for plaintiff's attorney's fees for this portion of the case in this circumstance will encourage settlement. This is so, according to the Supreme Court, because it "will require plaintiffs to think very hard about whether continued litigation is worthwhile." 473 U.S. at 11. But this is changed under the fine print of S. 2104. Attorneys' fees will no longer be included in costs. Thus, the plaintiff can recover attorneys' fees for work done after a rejected settlement offer, even when the judgment for the plaintiff turns out to be less than the settlement offer. This is an incentive to keep litigating rather than to settle the case.

5. Prohibiting attorneys fee waivers in class action settlements by overturning Evans v. Jeff D., 475 U.S. 717 (1986)

Yet another disincentive, if not an actual barrier, to settlements is created by the prohibition in Section 9(4) against the approval of settlements without the parties first attesting that a waiver of attorneys fees had not been compelled as a condition of settlement. Current law, under *Evans* v. *Jeff D.,* 475 U.S. 717 (1986), allows such approval, but a court still has the discretion to reject a settlement on the grounds that such a waiver had been compelled, or it may instruct the parties to negotiate the fees separately.

There is persuasive reason to overrule *Evans* v. *Jeff D.* Indeed, the Attorneys General in more than 42 States filed amicus briefs supporting the result reached by the Court in *Evans* v. *Jeff D.* The case does not mandate "forced waivers" of attorneys' fees claims. Rather, the Supreme Court merely held that a District Court has the power to approve a consent decree settlement that includes a waiver of attorney's fees. That decision does not require that parties to a Title VII case *must* waive their attorney's fees; it holds only that they *may* waive those claims. Thus, plaintiffs remain free to reject any settlement offer they deem unreasonable.

This is a sound, reasonable result. Parties to Title VII litigation should not be foreclosed from waiving attorney's fees claims as part of the negotiated settlement. On the contrary, there are valid reasons for parties to be permitted to waive fees claims during settlement negotiations. For many Title VII actions, particularly those primarily seeking injunctive relief, the attorney's fees awards are the largest monetary exposure facing defendants. Obviously, to the extent that plaintiffs are permitted to waive all or part of those claims and for their attorneys to obtain their fees from a lump sum settlement, Title VII actions will be more easily settled.

In *Evans* v. *Jeff D.,* the Court recognized these concerns and reached the correct result. "We believe", the Court majority stated, "that a general proscription against negotiated waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement." 475 U.S. at 732. The Court went on to say that it was ". . . not implausible to anticipate that parties to a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open." 475 U.S. at 736. The consequence of overturning this decision will be the addition of yet another obstacle to settlements.

6. Recovery of plaintiff's attorney's fees from the original defendant in actions by intervenors

Section 9(4) of the bill would reverse yet another Supreme Court decision in *Independent Federation of Flight Attendants* v. *Zipes,* 109 S. Ct. 2732 (1989). In that case, a union had unsuccessfully intervened in a sex discrimination suit to challenge a settlement. The original plaintiffs in the case, however, sought but were denied attorney's fees from the intervenor union. The Court ruled that losing intervenors need only pay fees when the intervenor's actions were frivolous, unreasonable, or without foundation.

The bill reverses, in part, the result in *Zipes.* Suppose a plaintiff sues an employer. They settle the case. Then, a third party intervenes and unsuccessfully challenges the settlement. Under this bill, the original plaintiff can recover its attorney's fees and other costs incurred defending the settlement against the intervenors, not from the unsuccessful intervenor, but from the employer. Thus, the employer not only pays its own attorney's fees and costs defending the settlement, but also the original plaintiff's fees and costs in doing so.

There is simply no adequate basis for reversing the result in *Zipes.* Moreover, there is absolutely no rationale for assessing the plaintiff's fees against the employer in the original action. No rationale, that is, other than the result-oriented and overriding interest that underlies, some of the bill's provisions—taking care of the plaintiff's attorney fees in every way imaginable.

7. Reimbursement for costly expert witness fees

Under current law, recovery of witness fees by the prevailing party is set by statute at $30 per day. This has the effect of holding down the costs of litigation. Section 9 of the bill would remove this cap and allow recovery of the actual fees, regardless of how exorbitant they may be. In so doing, it overturns *Crawford Fittings Co.* v. *J.T. Gibbons, Inc.*, 107 S. Ct. 2494 (1987).

Meanwhile, this provision only worsens the imbalance between the availability of prevailing plaintiffs to recover fees versus that of prevailing defendants. The former recover those fees as a matter of course; the latter rarely recover them since to do so they must show that the suit was frivolous, unreasonable or without foundation. *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978).

V. S. 2104 EFFECTIVELY AMENDS OVER 70 CIVIL RIGHTS STATUTES

Section 11(a) of S. 2104 states, "All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies."

There are dozens of Federal civil rights laws. In addition to Title VII and Section 1981, there are at least 20 substantive federal civil rights statutes, such as the Fair Housing Act, which we amended in 1988. The Department of Justice states that there are civil rights provisions banning discrimination in federally assisted programs in over 50 additional statutes, including the four we amended in the Grove City bill. As another example, The Job Training Parternship Act bans such discrimination on the basis of race, color, national origin, sex, religion, creed, or disability in programs funded thereunder.

This bill not only overturns numerous Supreme Court decisions, it not only goes well beyond overturning numerous Supreme Court decisions in its damages and pro-lawyer provisions, it amends dozens of statutes. It is as if we are adding a section 11(a) to each and every one of them. It will give federal agencies and judges roving commissions to expansively interpret all of these statutes.

No witness nor any proponent of the bill has identified constructions of any particular civil rights law to which they object and which this language overturns. The Congress is left to guess, but the courts and federal agencies are left to fill in these blanks.

Section 11(a) is very powerful language. It is made even more powerful by Section 2(b)(2) which says one of the bill's purposes "is to strengthen existing protections and remedies available under Federal civil rights laws"—not just Title VII and Section 1981—"to provide more effective deterrence and adequate compensation for victims."

We mention just two of the possibilities. Many proponents of this bill believe that a civil rights law barring racial or gender discrimination, to be broadly construed, must prohibit disparate impact discrimination as well as intentional discrimination. Section 1981 bans racial discrimination in making and enforcing contracts. We agree that it should be amended to cover terms and conditions of the contract. The Supreme Court, however, has construed Section 1981 to prohibit only intentional discrimination, not discriminatory effects or disparate impact. *General Building Contractors Assn.* v. *Pennsylvania,* 458 U.S. 375 (1982). Will this section overturn this decision and result in Section 1981 being construed to prohibit discriminatory effects and disparate impact? This appears to be among the objectives of this section. The Committee Report claims that there have been instances of allegedly narrow Supreme Court interpretations of civil rights laws in the past, "requiring" Congress to overrule them with new legislation. This Section is aimed at "guiding" the courts into avoiding these "mistakes" in the future. The Committee Report cites *City of Mobile* v. *Bolden,* 446 U.S. 55 (1980), as an example. In that case, the Supreme Court ruled that the Voting Rights Act is violated *only by intentionally* discriminatory conduct. The Voting Rights Act Amendments of 1982 overturn that decision and allow disparate impact claims to be heard under the Voting Rights Act.

If Section 1981 is so construed, and this is distinctly possible under Section 11(a), compensatory damages, punitive damages and jury trails will be available under Section 1981, not just for intent cases, but for discriminatory impact cases. This covers not just employment, but all contractual arrangements. It is a significant departure from current law.

Many persons believe that a prohibition against sex discrimination, "broadly construed," necessarily means providing abortion coverage in employee health and insurance policies. If the covered facility is a health facility, then many believe those facilities must be made available for abortions. Numerous federal funding statutes include bans on sex discrimination; thus recipients of federal aid under the Federal Water Pollution Control Act of 1948, 33 U.S.C. 1251 note; Youth Conservation Corps, 16 U.S.C. 1704(b); and the Job Training Partnership Act of 1982, 29 U.S.C. 1577 (a)(2); and many other funding statutes are subject to such a ban. In the 1988 Grove City legislation, Congress only made Title IX abortion-neutral, not such statutes as the ones just mentioned. Will entities receiving federal aid under these statutes be forced to adopt pro-abortion policies? It would appear that the only practical answer is that under S. 2104, this question will be left to the courts to resolve.

CONCLUSION

Title VII of the Civil Rights Act of 1964 has been in place for nearly a quarter of a century. Its prohibitions against employment discrimination have helped to reshape our society and our workplace and provide all Americans with the right to equality of opportunity. It is difficult to imagine one federal law that has benefited this nation more.

Unfortunately, S. 2104 does not restore Title VII's original intent nor promise. Instead, it would push this nation into a brand new arena of legal theories and rights. Employers who have not filled their jobs by quota would be presumed to be guilty of discrimnination in every instance, and they would bear the burden of proving their innocence. The notion that a person should be judged and hired or promoted because he or she is the most qualified, regardless of sex, race, national origin or religion, would be discarded. Instead, to end discrimination, we are told that race, sex, national origin and religion must become the paramount factor in every employment decision. We are told that to end discrimination we must deny some Americans one of the most cherished of all civil rights—the right to a day in court.

The farther we as a nation retreat from the principle that all Americans must be treated the same, the closer we come to the quagmire of a spoils system that has more to do with one's birth than one's qualifications. An individual's qualifications and abilities will be less important than the numerical standing of the group to which he or she belongs. And inevitably, group will be pitted against group. The unfortunte fact is that S. 2104 has little to do with the principle or promise of Title VII, but it has much to do with creating a brand new era of discrimination.

APPENDIX A.—LEGAL ANALYSIS: WARDS COVE DOES NOT OVERTURN GRIGGS

1. DISPARATE IMPACT THEORY/USE OF STATISTICS

A number of proponents of S. 2104 have claimed that *Wards Cove* "overturns" *Griggs*, and others claimed *Wards Cove* "effectively overturned" *Griggs*. This is wrong.

Wards Cove did not overturn *Griggs*. The disparate impact theory of liability under Title VII remains available today. Indeed, in 1988, in *Watson* v. *Ft. Worth Bank and Trust*, 108 S.Ct. 2777 (1988), the Court extended the availability of disparate impact theory to subjective employer selection practices, not just to objective ones like tests. This was regarded as a major victory for civil rights plaintiffs. Moreover, the proper use of statistics in such cases has been preserved.

2. PLAINTIFF MUST IDENTIFY SPECIFIC PRACTICE OR PRACTICES ACTUALLY CAUSING THE DISPARATE IMPACT

Requiring the plaintiff to identify the specific employer practice or practices actually causing the statistical disparity is reasonable. The defendant must be put on notice as to what he or she is being accused of. This is no new requirement. As Justice White noted in *Wards Cove,* every prior disparate impact case the Surpeme Court has heard "focused on the impact of particular hiring practices on employment opportunities for minorities" or women. See, e.g., *Griggs* v. *Duke Power Co.* 401 U.S. 424 (1971) (high school diploma; general intelligence tests); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) (written tests); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height/weight requirements); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977) (denying all accumulated seniority when a woman goes on pregnancy leave; denying sick-leave pay to pregnant employees); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979) (no-narcotics use); *Connecticut* v. *Teal*, 457 U.S. 440 (1982) (written test); *Watson* v. *Fort Worth Bank & Trust*, 108 S.CT. 2777 (1988) (supervisor's subjective judgement of employee applying for a promotion).

A number of lower courts had indicated that specific practices must be shown to cause a disproportionate impact. *Robinson* v. *Polaroid Corp.*, 732 F.2d 1010, 1016 (1st Cir. 1984); *Latinos Unidos de Chelsea* v. *Secretary of Housing*, 799 F.2d. 774, 786–87 (1st Cir. 1986) (Title VII case); *Pope* v. *City of Hickory*, 679 F.2d 20, 22 (4th Cir. 1982); *Pouncy* v. *Prudential Ins. Co. of America*, 668 F.2d 795, 800–801 (5th Cir. 1982); *Spaulding* v. *Univ. of Washington*, 740 F.2d 686, 705–707 (9th Cir. 1984) *cert. den.* 469 U.S. 1036; *AFSCME* v. *State of Washington* 70 F.2d 1401, 1405–06 (9th Cir. 1985). While some lower court cases do not reflect this consensus, this holding breaks no new ground. Again, the purpose of S. 2104 is to overturn all of these decisions as well.

3. MEANING OF "BUSINESS NECESSITY" IN "*GRIGGS*"

There have been many misconceptions about the term "business necessity." Here in what the Court actually said about business necessity: "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Griggs*, 401 U.S. at 431. "More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Id.* at 432. This "job-relatedness" test or "manifest relationship" test, a far cry from requiring that the employment practice be substantially and demonstrably related to effective job performance, is consistent with the Court's formulation in *Ward Cove* v. *Atonio*: whether the employment practice "serves in a significant way, the legitimate employment goals of the employer." 109 S.Ct. at 2125, 2126.

In *Albemarle Paper Co.* v. *Moody,* 442 U.S. 405 (1975), the Supreme Court described the employer's showing as one of "job-relatedness." 422 U.S. at 413. The Court also used the *Griggs* language that the employer practice must have "a manifest relationship to the employment in question. . . . If an employer does then meet the burden of proving that its tests are 'job-related,' it remains open to the complainant to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albemarle Paper Company* v. *Moody,* 422 U.S. 405, 425 [cites omitted]. Again, on the next page, the Court used the term "job-relatedness." [1]

In *Connecticut* v. *Teal,* Justice Brennan's opinion states that once plaintiffs make a prima facie case, "the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination." 457 U.S. 440, 446–447 citing *Griggs.* Again, the term used by the Supreme Court to describe the employer's showing is "manifest relationship" to the job, not the formulations offered by the proponents of S. 2104.

Again, in *Dothard* v. *Rawlinson,* using terms like "job-related," "manifest relationship," and "legitimate" interest, the Court construed *Griggs* much differently than S. 2104 and much like *Wards Cove:*

> Those cases make clear that to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.' *Griggs* v. *Duke Power Co. supra,* at 432.

Dothard v. *Rawlinson,* 433 U.S. 321, 329 (1977).

Business necessity simply never meant "substantial and demonstrable relationship to effective job performance," as far as Supreme Court cases go.

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[1] Nothing in the Committee Report's citation to the *Albemarle* case contradicts our view of pre-*Wards Cove* law and *Wards Cove's* consistency therewith. The Committee Report, however, does inaccurately describe pre-*Wards Cove* law as permitting justifications of business practices that *only* go to actual job performance. The Supreme Court has held that the job-relatedness standard of *Griggs* is met when a written test is related to performance at a concededly useful police training course. *Washington* v. *Davis,* 426 U.S. 229 (1976). The Court said, the *Griggs* standard is met wnen a written test "was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the [test], wholly aside from its possible relationship to actual performance as a police officer." 426 U.S. at 450. The Court expressly stated that this result is consistent with *Griggs* v. *Duke Power* and *Albemarle Paper Co.* v. *Moody. Id.* at 250, 251. See *Spurlock* v. *United Airlines,* 475 F.2d. 216 (10th Cir., 1972). S. 2104 would strike down this decision as well.

Indeed, the Supreme Court made this crystal clear, again, in 1979. In *New York Transit Authority* v. *Beazer*, the Court used the "job-related" standard of *Griggs*, rejected language like that appearing in S. 2104, and used the formulation *Wards Cove* used 10 years later. Here is what the Supreme Court said in 1979:

> At best, respondents' statistical showing is weak; even if it is capable of establishing a prima facie case of discrimination, it is assuredly rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is *'job related.'* . . . Respondents recognize, and the findings of the District Court establish, that TA's legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and of a majority of all methadone users. The District Court also held that those goals require the exclusion of all methadone users from the 25 percent of its positions that are "safety senstive." . . . Finally, the District Court noted that *those goals are significantly served by—even if they do not require—TA's rule as it applies to all methadone users, including those who are seeking employment in non-safety-sensitive positions.* The record thus demonstrates that TA's rule *bears a "manifest relationship to the employment in question."* *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425. *Whether or not respondents' weak showing was sufficient to establish a prima facie case, it clearly failed to carry respondents' ultimate burden of proving a violation of Title VII.* 440 U.S. at 587 and n.31 [emphasis supplied].

The Supreme Court speaks of "job-relatedness," and "manifest relationship to the employment in question." These terms are from *Griggs*. The Court did not use the term, "substantial and demonstrable relationship to effective job performance." It uses the term "significantly served by," not "substantial and demonstrable." The Court viewed the "significantly served by" language terms as consistent with the language in *Griggs*. The Court's *Beazer* formulation is virtually the same one it used in *Wards Cove*. And, the Court also said the plaintiff had the ultimate burden of proving a Title VII violation, as *Wards Cove* reiterated.

4. BURDEN OF PRODUCTION

Justice Brennan wrote in *Price Waterhouse* v. *Hopkins* in 1989: "Conventional rules of civil litigation generally apply in Title VII cases, [citing the Court's comment in *Aikens* that discrimination [is] not to be 'treat[ed]'. . . differently from other ultimate questions of fact." 109 S. Ct. 1775, 1792. One such rule is Federal Rule of Evidence 301. The Rule says that unless otherwise provided, "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

Ironically, in light of the hue and cry about this issue, the Court had already addressed it in its 1979 disparate impact case, *New York Transit Authority* v. *Beazer.* The Court said there that the plaintiff in such a case, after making a prima facie statistical showing, has the "ultimate burden of proving a violation of Title VII." 440 U.S. at 587 and n.31.

The Supreme Court had never ruled in a Title VII disparate impact case that the employer had a burden of persuasion—a burden of persuading a Court of its innocence. Some proponents of the bill claim that the Court's use of the terms "prove", "show", and "demonstrate" to describe an employer's burden in some of its earlier disparate impact cases meant that the employer had a burden of persuasion. This is simply not so. As Justice O'Connor said in *Watson,* terms such as these "should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." 108 S. Ct. at 2790.

Indeed, the Supreme Court had used these same terms in some of its Title VII *intent* cases in the 1970s. Yet, the Court ruled that these terms are consistent with the burden of production, and that the employer's burden in Title VII intent cases are, indeed, a burden of production, not persuasion. *Board of Trustees of Keene State College* v. *Sweeney,* 439 U.S. 24, 25 (1978). See also *Texas Dept. of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981). The Court has also construed the term "burden of proof" in the Administrative Procedure Act (Section 7(c)) as "only the burden of going forward, not the burden of persuasion," *NLR* v. *Transportation Management Corp.,* 462 U.S. 393, 404 n.7 (1983).

Thus, just as the use of terms such as "prove," "show," and "demonstrate" in some early Title VII intent cases are consistent with a burden of production, so is their use in some Title VII disparate impact cases, including those cited by former Secretary of Transportation, William Coleman.

The burden of production versus the burden of persuasion is not just arcane and technical legal talk. Under S. 2104, if the burden of persuasion is shifted to the employer to make out what amounts to an affirmative defense, Title VII is irrevocably changed. Title VII will become a statute which makes racial, ethnic, and gender imbalance alone illegal. This is so even if the other offending parts of Sections 3 and 4 were deleted. Even if we deleted the new and onerous definition of "business necessity" and the right to allege an entire hiring or promotion process is illegal based on mere numbers alone, this switch in the burden of persuasion would be profound.

In contrast to S. 2104, the disparate impact test under Title VII makes illegal not mere racial or gender imbalance. Title VII makes illegal disparate impact caused by identified employer practices which are shown to be not manifestly related to the employment in question. That is a crucial difference. That is why the plaintiff properly has the burden of proving the imbalance is caused by particular practices and that those practices are not manifestly related to the employment in question. The plaintiff is aided in this task by the requirement that the employer must produce evidence justifying the practice. That justification cannot simply be that it is convenient for the employer, the evidence must show that the practice significantly serves a legitimate goal. Moreover, the plaintiff need not prove that the "employer has no legal justification" for its practices, as the proponents of the bill incorrectly claim. The plaintiff must attack the specific justification offered by the employer. And the plaintiff has full tools of discovery available to do it. So describing the plaintiff as having too tough a burden ignores the reality of these cases. This ignores the fact that the employer must come forward with a credible explanation of why its practices significantly serve its legitimate goals. The plaintiff then has as concrete target to shoot at. The ultimate burden on the plaintiff, to prove there is disparate impact discrimination, is reasonable because one of the elements of that discrimination is a lack of job-relatedness in the employer's practices. As Professor Kingsley R. Browne, Associate Professor of Law at Wayne State University, one of the witnesses before the Committee, noted:

> Fundamentally, the question of whether the burden that shifts is one of persuasion or one of production depends upon what constitutes the "wrong" in a disparate-impact case. If the wrong is . . . that an employer has a work force that is 'out of balance,' then arguably it makes sense to say that an employer may attempt to prove the 'affirmative defense' of 'business necessity.' The affirmative defense is simply an act of grace by Congress. However, if the wrong is the placement of arbitrary barriers (that is, barriers that are not job related) in the way of minority advancement, as *Griggs* held, then showing that the barrier is in fact arbitrary is part of the plaintiff's case. Of course, the plaintiff's presentation is facilitated by the employer's obligation to come forward with evidence of justification, so that the plaintiff need not preemptively rebut all conceivable justifications.

Moreover, even if the plaintiff cannot show that the practice in question does not significantly serve a legitimate employer goal, the plaintiff can still prevail. If he or she can show that there is another practice, serving the employer's goals equally well but with less disparate impact, the plaintiff wins.

We also note the inconsistency of the proponents of this bill. The Court has long held that the allocation of burdens and order of presentation of proof in a garden variety Title VII case alleging discriminatory intent is the same as it described the allocation in *Wards Cove* for disparate impact cases. *McDonnell Douglas Corporation* v. *Green,* 411 U.S. 792 (1973). The Court reiterated this with great care in *Texas Dept. of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981). In an intent case, once a plaintiff makes a prima facie showing of disparate treatment, the burden shifts to the employer to produce evidence of a nondiscriminatory reason for the employment decision. If the employer carries this burden of production, the plaintiff then has the opportunity to prove that the employer's explanation is a pretext for discrimination.

"The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiffs." *Burdine,* 450 U.S. at 253.

Yet, S. 2014 would create an inconsistency in the handling of Title VII cases. It would be extremely anomalous, in 1990, to impose a heavier burden of justification upon an employer accused, not of intentional discrimination, but only of using a neutral device it honestly believed was appropriate, like a test or an experience requirement, which had a disproportionate impact on minorities or women. After all, who is the more culpable actor, an employer who deliberately tries—overtly or covertly—to keep out or limit minorities or women, or an employer who, without trying to keep out minorities or women, is using neutral employment standards he or she feels are appropriate, even if ultimately shown not to be manifestly related to the employment in question? Clearly, it is the employer who intentionally discriminates. This is precisely the point the Court of Appeals for the Third Circuit made in 1981 when it said the burden on the employer in disparate impact cases is one of production, relying on the Supreme Court's *Beazer* decision. *See NAACP* v. *Medical Center, Inc.,* 657, F.2d 1322, 1333-1335 (3rd Cir. 1981).[2]

Indeed, as the Third Circuit noted in *NAACP* v. *Medical Center,* "[a]s a practical matter, a procedural distinction between the impact and intent cases would cause unnecessary confusion in the trial courts, particularly so in cases like the one at hand in which both theories are advanced. It is difficult to understand what important interests would be served by imposing two different burdens on the defendant in a case of this nature. Certainly the multiplication of procedural devices is not a desirable development in trial practice." 657 F.2d at 1335 (citation omitted).

And, the Court was speaking of a case tried to a judge. In fact, this bill adds jury trails for intent cases. Thus, the jury will hear *both* the intent claim and the disparate impact claim in a case where both theories are alleged in the lawsuit. The judge would have to insruct the jury on two different burdens on the employer in the same lawsuit. It would be a very confusing task for the jury.

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[2] The Committee seeks to rebut this, in part, by claiming: ". . . in a disparate treatment case, once the complaining party demonstrates discriminatory intent, the case, is over—the complaining party prevails." The Report glosses over the fact that in *McDonnell Douglas* intent cases, once the complaining party establishes its prima facie case, the burden that shifts to the employer is one of *production* of evidence of its legitimate reasons for the employment decision. Once the employer meets this burden of production, the complaining party has the burden of persuasion to show that the explanation is unpersuasive, i.e., the complaining party retains at all times the ultimate burden of persuasion that the employer committed discrimination.

Further, the Committee Report is incorrect, and contradicts Title VII's express language (Section 703(j); 42 U.S.C. 2000e-2(j), when it says, "By contrast, in a disparate impact case, once a complaining party has demonstrated that a challenged practice or group of practices operates to exclude qualified minorities or women, the employer may escape liability altogether by showing that the [practice or practices] is required by business necessity." In fact, under Title VII, in order to establish liability, a plaintiff must do more than show bottom-line imbalance. A plaintiff must show that the specially challenged practice(s) causes the imbalance, and, once the employer offers its explanation for the practice, the plaintiff must meet its ultimate burden of persuasion that the practice is not manifestly related to the employment in question.

We should be consistent and keep the burdens on the employer the same in intent and disparate impact cases—a burden of production.

The stakes in Sections 3 and 4 of this bill are very high. How high?

In the *Watson* v. *Fort Worth Bank and Trust* case, decided in 1988, Justice O'Connor warned us about the real risk of imposing quotas on the American people if the Title VII disparate impact theory is misused. In that case, the Supreme Court actually extended the application of the disparate impact theory to subjective employment practices, a great victory for civil rights plaintiffs. She then went on to say:

> We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. . . . It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically proivded that employers are not required to avoid 'disparate impact' as such; [citing a specific provision of Title VII (Section 703(j))] . . . . Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitutoin, . . . and it has long been recognized that legal rules leaving any class of employers with "little choice" but to adopt such measures would be "far from the intent of Title VII. . . ." *Watson,* 108 S.Ct. at 2787-88 (quoting Justice Blackmun, *Albemarle Paper Co.,* 422 U.S. at 449) [citations omitted, emphasis in original].

Thus, Justice O'Connor acknowledged that:

> Extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent and it should not be the effect of our dicision today.
>
> We recognize, however, that today's extension of [the disparate impact] theory into the context of subjective selection practices could increase the risk that employers will be given incentives to adopt quotes or to engage in preferential treatment. Because Congress has to clearly and emphatically expressed its intent that Title VII not

> lead to this result, 42 U.S.C. Section 2000e–2(j), we think it imperative to explain in some detail why the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized. *Id.* at 2788.

And then Justice O'Connor, in her four member plurality opinion, laid out the standards for proving a disparate impact case. These are the very same standards adopted by a majority of the Court, with the addition of Justice Kennedy, in *Wards Cove*, and which are consistent with *Griggs*. If S. 2104 is enacted, the careful evidentiary standards set forth in *Watson* and *Wards Cove* aimed at avoiding imposiiton of quota hiring and promotion in this country will be overturned. This will lead to the very result Justice O'Connor so eloquently voiced in *Watson* and repeated by Justice White in *Wards Cove*.

In *Wards Cove*, the Court held:

> In order to use statistical evidence to establish a prima facie of disparate impact, you must make a comparison between the percentage of qualified minorities in the relevant labor pool and the percentage of minorities in the job in question. To compare the percentage of minorities in an employer's unskilled jobs to their percentage in skilled jobs, is "nonsensical," as Justice White said.
>
> A plaintiff must then demonstrate that the disparity results from the employment practice(s) he or she is challenging, not merely assert that the employer's entire set of hiring practices results in an imbalance. This seems an obvious requirement for a prima facie case. As Justice White said, "To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces,'" 109 S. Ct. at 2125 (quoting the *Watson* opinion by Justice O'Connor).
>
> Once the plaintiff makes a prima facie case by showing a relevant disparity resulting from the employer's practice(s), the employer has the burden of producing evidence of a legitimate reason for the employment practices in question.
>
> That is, the employer's burden is to produce evidence that its challenged practice(s) serves in a significant way legitimate employment goals; the employer need not produce evidence that the practice is necessary or essential to effective job performance. The latter would be an impossible burden for employers to meet. It would cause an erosion of standards and force employers to adopt quotas in order to avoid liability.
>
> The burden of persuasion in these cases remains with the plaintiff—an elementary part of how our civil justice system works. The plaintiff under Title VII must prove discrimination has occurred, the defendant is not required to prove his innocence, i.e. that he has not discriminated. Thus, once the employer produces evidence of the legitimacy of the practice in question, the plaintiff must show that

> the proffered business justification is a pretext or otherwise not legitimate. This is how the federal rules of evidence operate. Federal Rule of evidence 301.
>
> Even then, if the plaintiff cannot prevail on the business justification question, he or she may still prevail by coming forward with alternative employment criteria that reduce the disparate impact of existing employment practices. But these alternatives must be equally effective in serving the employer's legitimate employment goals.
>
> There is nothing unusual about this. It has all been said by the Courts before. See, e.g., *New York Transit Authority* v. *Beazer,* 440 U.S. 568, 587 n. 31 (1979); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 413, 425 (1975); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431, 432 (1971); *See also, Watson* v. *Ft. Worth Bank and Trust,* 108 S. Ct. 2777, 2787-2791 (1988); *NAACP* v. *Medical Center,* 657 F. 2d. 1322, 1334-1336 (3rd. Cir. 1981).

These standards reflect prior Supreme Court precedent, including *Griggs,* not a departure from precedent. They implement the disparate impact standard in a sensible way, they do not overturn it.

Dothard v. *Rawlinson*

Remarkably, proponents of S. 2104 assert that the *Dothard* decision supports the "essential to effective job performance" standard. A reading of the case, however, makes clear that not only does it not support such a standard, it supports the job-relatedness standard of *Griggs* and is consistent with *Wards Cove.*

The Supreme Court did not use an "essential to effective job performance" standard in describing the employer's task in a desparate impact case. In *Dothard* v. *Rawlinson* 433 U.S. 321 (1977), a woman challenged minimum height and weight requirements for prison guard jobs.

The Supreme Court said that once a plaintiff establishes a prima facie case, the employer must show " '. . . that any given requirement (has) . . . a manifest relationship to the employment in question.' " 433 U.S. at 329 (citing the *Griggs* case). The Court went on to use the term "job-related" to describe the standard the employer is to be judged against. This is not an "essential to effective job performance" standard.

The Court noted that the *employer* asserted that a certain amount of strength "is essential to effective job performance" as a prison guard. *Id.* at 331. This was not a standard enunciated or adopted by the Court—indeed, the Court noted that the employer failed to provide any specific justification for the weight and height requirements.

In other words, the Court here, as elsewhere in its opinions, used the terms "job-related" and "manifest relationship to the employment in question" to describe the standard applicable to the employer. Snatching a phrase out of context, used by the employer, and mentioned by the Court so as to illustrate the failure of the employer to provide any evidence whatsoever to support its job requirements, provides no legitimate basis for characterizing Supreme Court precedent on this matter.

In a footnote, in referring to the concept of "business necessity", the Court said, "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." 433 U.S. at 331, 332, n.14. The word "necessary" does not mean "essential" or "required", either as a legal term generally, or in the context of the Supreme Court precedent on this issue. As former Solicitor General Charles Fried testified, the word "necessary" in the law admits of several meanings. He pointed out that the "necessary and proper" clause in the Constitution has not been construed to limit Congress' legislative authority to that which is "essential" to carrying out its enumerated powers. The Court has made clear "business necessity" means job-related, not essential. In fact, the sentence in the footnote itself refers to *Griggs* as reflecting the proper standard.

Indeed, two years later, in *New York Transit Authority* v. *Beazer*, a 1979 decision, the Court used the "job-related" standard of *Griggs*, rejected language like that appearing in S.2104, and basically used the formulation *Wards Cove* used 10 years later, as mentioned earlier.

APPENDIX B.—EXCERPT OF TESTIMONY OF GLEN NAGER CONCERNING SECTION 6

A scheme is otherwise consistent with due process only when it provides "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford[s] them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The purpose of this notice requirement is to enable the recipient to "choose for himself whether to appear or default, acquiesce or contest" (*Mullane*, 339 U.S. at 314); to that end, "[n]otice by mail or other means as certain to ensure actual notice [is required in] a proceeding which will adversely affect the liberty or property interests of any party, . . . if its name and address are reasonably ascertainable." *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 800 (1983). Moreover, the notice must be such that it will "apprise [the person] of, and permit adequate preparation for, an impending 'hearing.' " *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 14 (1978). Finally, due process requires " 'an opportunity . . . granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case.' " *Boddie* v. *Connecticut*, 401 U.S. 371, 337–378 (1971) (citation omitted).

Under these due process principles, there is serious reason to doubt the constitutionality of the procedures set forth in Section 6 of S. 2104. Section 6 does not itself create a procedure that reasonably attempts to provide interested persons with notice of the proceedings to which it attempts to blind them. Nor does it ensure an opportunity for adequate preparation for the hearing. And, finally, it does not provide for a hearing that is appropriate to the nature of the case, that occurs at a meaningful time, and that is undertaken in a meaningful manner.

With respect to the notice issue, Section 6 does not even purport to create any kind of notification procedure. Rather, it purports to bind persons who have actual notice from another source, who have been adequately represented by another person, or who were the object of reasonable notice efforts. The Supreme Court has made clear, however, that actual notice of a proceeding does not relieve the government of its affirmative duty to give an individual formal notice of a proceeding in which his rights will be finally adjudicated. *See Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. at 311; *see generally* Comment, *Collateral Attacks on Employment Discrimination Consent Decrees,* 53 U. Chi. L. Rev. 147, 162 (1986). Likewise, the Court has made clear that adequacy of representation does not relieve the government of its obligation to provide an individual with notice and an opportunity to represent himself (as occurs in the class action context under Rule 23 of the Federal Rules of Civil Procedure). *See Hansberry* v. *Lee,* 311 U.S. at 41–42; 7B C. Wright, A. Miller, & M. Kane, *supra*, § 1786, at 188–191 (2d ed. 1986). Finally, the reasonable efforts of others to provide notice of the proceedings cannot substitute for procedures that ensure that these efforts occur in every circumstance. *See* Comment, *supra* at 162.

With respect to the adequacy of any notice provided, Section 6 simply contains no requirements and sets no standards. Section 6 does not require that the individual who will be bound be informed of the nature of the proceeding or the issues that will be adjudicated in it. Section 6 does not require that the individual be informed of the relief sought in that proceeding or how that relief will affect his interests. And Section 6 does not inform the individual of the consequences of failing to appear, or of the rights that the individual will obtain by appearing. It simply states that the individual should be told that the proceeding "might" affect his interests. Such notice, occurring before the employment practice has even come into existence (much less applied to the individual), it too general and speculative to be constitutionally meaningful. *See Mennonite Board of Missions* v. *Adams,* 462 U.S. at 800 (mortgagee's knowledge of tax delinquency is not equivalent to notice of pending tax sale); see generally Kramer, *Consent Decrees and the Rights of Third Parties,* 87 Mich. L. Rev. 321, 344 (1988).

Finally, Section 6 does not provide for a hearing that is appropriate to the nature of the case, that occurs at a meaningful time, and the takes place in a meaningful manner. To be sure, for persons who have actual notice of the proceeding, Section 6 states that those persons must have a "reasonable opportunity to present objections to such judgment or order." But the opportunity to present objections in these circumstances is not constitutionally sufficient; it does not include the rights of discovery, confrontation, cross-examination, presentation of testimony, argument, and appeal that are the hallmark of due process and that are necessary to ensure that the individual's right to be free from unlawful discrimination is adequately protected. *See Goldberg* v. *Kelly*, 397 U.S. 254, 266–277 (1970); *Geene* v. *McElroy*, 360 U.S. 474, 496–497 (1959); *see also* Laycock, *Consent Decrees Without Consent,* 1987 U. Chi. Legal F. 103, 111, 128. In similar circumstances, the Supreme Court has indicated that even parties to the litigation cannot be bound by a decree to which they have not consented (unless, of course, they have had the opportunity to litigate their claims). *See Firefighters* v. *Cleveland,* 478 U.S. 501, 528–529 (1986).

I recognize that Section 6 does not purport to alter the standards for intervention under Rule 24 of the Federal Rules of Civil Procedure and, furthermore, that persons who have in fact intervened, either before or after the litigated or consent judgment was entered, retain the right to press their claims. The availability of intervention, however, does not relieve the government of its obligation to provide the non-party with notice of the proceeding. *See Mullane, supra,* at 172. Moreover, intervention may not be available prior to the entry of the decree or, indeed, until months or years after the entry of a decree—as, for example, it true of a person who is denied a promotion or a job under a consent decree that was entered when he was a child. *See* Laycock, *supra,* at 149. Indeed, intervention may be denied—either correctly or incorrectly—and thus may not provide a vehicle for participation at all. *See generally* Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincers Movement,* 1987 U. Chi. Legal F. 155, 161-164. And, in all events, the Supreme Court long ago held that the mere availability of a right of intervention is not a sufficient basis for binding an individual to a judgment entered in litigation to which the individual was not party. *See Chase National Bank* v. *Norwalk,* 291 U.S. 431, 441 (1934).

ORRIN HATCH.
STROM THURMOND.
DAN COATS.

X. CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CIVIL RIGHTS ACT OF 1964

* * * * * * *

TITLE 42—UNITED STATES CODE

* * * * * * *

§ 1981. Equal rights under the law

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

* * * * * * *

§ 2000e. Definitions

For the purposes of this subchapter—

(a) * * *

* * * * * * *

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "group of employment practices" means a combination of employment practices that produce one or more employment decisions.

(o) The term "required by business necessity" means essential to effective job performance.

(p) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof).

* * * * * * *

(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—

(1) An unlawful employment practice based on disparate impact is established under this section when—

(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices are required by business necessity, except that—

(i) if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact; and

(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in Schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

§ 2000e-2. Unlawful employment practices

(a) EMPLOYER PRACTICES.—

* * * * * * *

*(h) SENIORITY OR MERIT SYSTEM; QUANTITY OR QUALITY OF PRODUCTION; ABILITY TESTS; COMPENSATION BASED ON SEX AND AUTHORIZED BY MINIMUM WAGE PROVISIONS.—*Notwithstanding any

other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. *Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.* It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * * * * * *

(l) Discriminatory Practice Need Not Be Sole Motivating Factor.—Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though such practice was also motivated by other factors.

(m) Finality of Litigated or Consent Judgments or Orders.—

(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws—

(A) by a person who, prior to the entry of such judgment or order, had—

(i) notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person; and

(ii) a reasonable opportunity to present objections to such judgment or order;

(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or

order prior to or after the entry of such judgment or order; or

(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons consistent with the constitutional requirements of due process of law.

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure;

(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government; or

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction.

(3) Any action, not precluded under this subsection, that challenges an employment practice that implements a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

* * * * * * *

§ 2000e-5. Enforcement provisions

(a) POWER OF COMMISSION TO PREVENT UNLAWFUL EMPLOYMENT PRACTICES.—

* * * * * * *

(e) TIME FOR FILING CHARGES; TIME FOR SERVICE OF NOTICE OF CHARGE ON RESPONDENT; FILING OF CHARGE BY COMMISSION WITH STATE OR LOCAL AGENCY.—A charge under this section shall be filed within [one hundred and eighty days] *2 years* after the alleged unlawful employment practice occurred *or has been applied to affect adversely the person aggrieved, whichever is later,* and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter [, except that in]. *In* a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, [such charge shall be filed] *whichever is earlier, and* by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

* * * * * * *

(g) INJUNCTIONS: APPROPRIATE AFFIRMATIVE ACTION; EQUITABLE RELIEF; ACCRUAL OF BACK PAY; REDUCTION OF BACK PAY; LIMITATIONS ON JUDICIAL ORDERS.—If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. *With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k))—*

> *"(A) compensatory damages may be awarded; and*
>
> *"(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent;*

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. If compensatory or punitive damages are sought with respect to a claim arising under this title, any party may demand a trial by jury. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title *or, in a case where a violation is established under section 703(l), if the respondent establishes that it would have taken the same action in the absence of any discrimination.*

* * * * * * *

(k)*(1)* ATTORNEY'S FEE; LIABILITY OF COMMISSION AND UNITED STATES FOR COSTS.—In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee *(including expert fees and other litigation expenses) and* [as part of the] costs, and the Commission and the United States shall be liable for costs the same as a private person.

(2) No consent order or judgment settling a claim under this title shall be entered, and no stipulation of dismissal of a claim under this title shall be effective, unless the parties and their counsel attest to the court that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement.

(3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order.

* * * * * * *

§ 2000e-16. Employment by Federal Government

(a) DISCRIMINATORY PRACTICES PROHIBITED; EMPLOYEES OR APPLICANTS FOR EMPLOYMENT SUBJECT TO COVERAGE.—

* * * * * * *

(c) CIVIL ACTION BY EMPLOYEE OR APPLICANT FOR EMPLOYMENT FOR REDRESS OF GRIEVANCES; TIME FOR BRINGING OF ACTION; HEAD OF DEPARTMENT, AGENCY, OR UNIT AS DEFENDANT.—Within [thirty days] *ninety days* of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) SECTION 2000e-5(f) THROUGH (k) OF THIS TITLE APPLICABLE TO CIVIL ACTIONS.—The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, *and the same interest to compensate for delay in payment shall be available as in cases involving non-public parties.*

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§ 2000h-6. Separability of provisions

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SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

(a) EFFECTUATION OF PURPOSE.—All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.

(b) NONLIMITATION.—Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to repeal or amend by implication any other Federal law protecting such civil rights.

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